89-585

No. ___-_____

IN THE
Supreme Court of the United States

October Term, 1989

GREGORY R. McDONALD, WILLIAM L. GARRISON, JR., SANDRA BAXTER, T. WYATT BAXTER, DOUGLAS J. ZIMMER, MERRI JO ZIMMER, SAMUEL J. BASSO AND COLLEEN McDANELD,
Petitioners,

v.

ALAN M. GOTTLIEB AND THE SECOND AMENDMENT FOUNDATION, A NONPROFIT CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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September 29, 1989

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QUESTIONS PRESENTED

1. Whether the appellate court, in a defamation action involving a public figure in a debate of public importance, erred in affirming findings of actual malice by the trial court without conducting a *de novo* review of the record.

2. Whether the appellate court, in a defamation action involving a public figure in a debate of public importance, erred in affirming a damage award by the trial court when there was insufficient or no evidence presented at trial establishing actual damages and/or actual malice.

3. Whether the appellate court, in a defamation action involving a public figure in a debate of public importance, erred in affirming a damage award when the trial court, acknowledging that the defamation plaintiffs had suffered damage to reputation as a result of unrelated adverse publicity and statements made which were protected by qualified privilege, failed to distinguish the damages allegedly caused by the alleged defamatory statements from the damages caused by the privileged statements or by others.

4. Whether a state trial court can make general findings of defamation without specifically identifying those statements which were defamatory.

5. Whether the appellate court erred in ignoring whether a statement made by defendants and found to be true by a trial court after hearing live testimony in interlocutory proceedings, can later be found to be false and defamatory by another trial court.

6. Whether the appellate court, in a defamation action involving a public figure in a debate of public importance, erred in affirming clearly unconstitutional findings by the trial court that certain statements were defamatory when such statements were clearly opinion or anecdotal.

7. Whether the appellate court, in a defamation action involving a public figure in a debate of public importance, erred in affirming findings by the trial court that certain statements were defamatory when such statements were minor reporting errors in which the essential elements were factual and true.

8. Whether the appellate court, in a defamation action involving a public figure in a debate of public importance, erred in affirming findings by the trial court that certain statements were defamatory when such statements were made only to the defamation plaintiffs and/or plaintiffs' counsel, but not to the public.

9. Whether the Superior Court of Washington for King County erred in failing to grant Petitioners' Motion for Summary Judgment prior to trial, when the Respondents' complaint for defamation failed to identify specific defamatory statements and failed to specify damages.

10. Whether the appellate court erred in refusing to review the denial of the Petitioners' motion for summary judgment when said motion involved First Amendment issues.

LIST OF PARTIES

The parties to the proceedings below were petitioners Gregory R. McDonald; William L. Garrison, Jr.; Sandra Baxter; T. Wyatt Baxter; Douglas J. Zimmer; Merri Jo Zimmer; Samuel J. Basso; Colleen McDaneld; Glenn Richard Anderson; Bruce Moriarty; and Diane Moriarty.

The American Civil Liberties Union of Washington was an *amicus curiae* in the court below on the issues of defamation, libel and slander.

The respondents before this Court are Alan M. Gottlieb and the Second Amendment Foundation, a Washington non-profit corporation.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF THE STATE OF WASHINGTON

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals for the State of Washington (App. A, *infra*, pp. A1-A17) is unreported. The Findings of Fact and Conclusions of Law found by King County Superior Court Judge Frank D. Howard (App. D, *infra*, pp. D1-D36) is also unreported.

JURISDICTION OF THIS COURT

The Memorandum Opinion of the Court of Appeals of the State of Washington was entered and filed on January 17, 1989. Subsequently, Petitioners filed a Petition for Review (App. B, *infra*, pp. B1-B22) which was denied by the Washington State Supreme Court by an Order entered on June 6, 1989 (App. C, *infra* pp. C1-C2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The pertinent provisions of the Constitution of the United States here involved are Amendment I and Amendment XIV and are set forth in Appendix G, *infra*, pp. G1-G3.

STATEMENT OF THE CASE

This is a case of a state court system run amok, trampling roughshod over the Petitioners' Constitutional rights and ignoring the protections afforded speakers in a public debate by the First Amendment to the Constitution, all in disregard of past rulings of this Court in the area of defamation, libel and slander.

It is also a case of how a defamation lawsuit was used as a political weapon. Of how well-meaning, concerned citizens who attempted to blow the whistle on the improper conduct of someone who professionally raises funds in the name of charity but who diverts those funds for his own benefit, found themselves on trial.

Petitioners were all employees and/or members of the Second Amendment Foundation, a Washington nonprofit corporation granted under IRC § 501(c)(3) status. The ostensible purpose of the Second Amendment Foundation (hereinafter "SAF") was to promote a better understanding of the right to keep and bear arms. SAF boasted more than 400,000 members nationwide. Since its incorporation in 1975, SAF had been headed by Alan M. Gottlieb, its president; all but one of the five members of the self-perpetuating board of trustees served continuously from that date.

On August 31, 1984, Petitioners Gregory R. McDonald, William L. Garrision, Sandra Baxter, Douglas J. Zimmer, Samuel J. Basso, and Colleen McDaneld were fired from their jobs with SAF by Alan M. Gottlieb and by Michael Kenyon, acting on instructions of Gottlieb. Gottlieb was then serving a one-year and one-day sentence in a correctional facility on federal felony charges of perjury related to income tax evasion.

On that day, Petitioners filed a derivative action complaint in the Superior Court of Washington for King County against Gottlieb and the trustees alleging breach of fiduciary duty and self-dealing, and asked that the court place SAF under control of a receiver. Petitioners' employment was terminated because they had questioned Gottlieb's use of SAF funds and what they perceived to be his self-dealing. These concerns were the same that were expressed in their complaint and included:

1. While serving time in prison, Gottlieb continued to draw his salary from SAF and a related nonprofit entity, the Citizens Committee for the Right to Keep and Bear Arms (hereinafter "CCRKBA").

2. Gottlieb arranged for SAF and the CCRKBA to pay approximately $265,000 as downpayment on their $760,000 headquarters office building and land. Gottlieb paid about $19,000 in closing costs, the bulk of which was paid to him by SAF and CCRKBA in the form of bonuses and rent deposits. Gottlieb then transferred the building (valued at $550,000) into his name, the land (valued at $250,000) into SAF and CCRKBA's names, and leased the building back to SAF and CCRKBA at above-market rental rates. Gottlieb then had SAF and CCRKBA sign a 30-year, fixed-price, ground lease with him, providing the nonprofit organizations an effective return on their investment of 1.8%. SAF and CCRKBA's personal property was pledged as collateral for the building loan. Gottlieb's personal tax attorneys represented all parties and prepared all relevant documents in the transaction.

3. Gottlieb required SAF to do business with several of his for-profit companies, some of which were housed rent-free in the SAF/ CCRKBA headquarters building.

4. Gottlieb put his name on a book authored by the SAF staff, had SAF pay for publication of the book, and personally collected royalties on the book.

5. Gottlieb had SAF purchase a $265,000 IBM mainframe computer, transferred control of it to the The Service Bureau Cooperative, of which his wife was president, and charged SAF for the use of the computer, and continued to have SAF pay for programming, maintenance, power, insurance and property taxes on the computer.

6. Gottlieb placed various family members on the SAF payroll and they did not perform services for SAF. Gottlieb also had SAF and CCRKBA pay for his wife's travel to visit him in prison.

7. Gottlieb conducted a national sweepstakes, mailing solicitations to more than 5 million people, and never awarded the prizes.

8. Gottlieb fraudulantly submitted documents and exhibits on behalf of the CCKRBA, a political lobbying organization, to the U.S. Postal Service in order to obtain a special reduced-rate postage permit only for charitable organizations, when in fact the materials were educational materials of SAF which had been altered to make it appear as if they were published by CCRKBA.

> 9. Gottlieb required SAF to deposit virtually all of its cash assets (well in excess of Federal Savings and Loan Insurance Corporation limits) and purchase huge amounts of stock in a savings and loan association in which Gottlieb personally was a major stockholder.

Petitioners alleged that the above acts constituted self-dealing and breach of fiduciary duty. Petitioners formed an *ad hoc* committee called "Save the Second Amendment Foundation" (hereinafter "SAVE SAF"), and began publication of a newsletter called *Up in Arms!* which was mailed to SAF members to keep them informed of the litigation.

On September 10, 1984, Respondents filed a defamation complaint in King County Superior Court making general, non-specific, allegations of defamation, and stated that the Petitioners' mere act of filing a complaint against Gottlieb and SAF was itself defamation. The two cases were consolidated by the lower court.

In late October, 1984, an eight-day hearing was held to show cause why a temporary receiver for SAF should not be appointed. Judge Robert Winsor found that the Petitioners "had been fired", that SAF had members and Gottlieb's assertion that membership "was merely a fundraising gimmick. . .should stick in his throat". The court also found that while there was insufficient cause to appoint a receiver at that time, there was cause for concern and he imposed certain restrictions on SAF's activities which among other things included termination of Gottlieb's salary while in prison, monthly reporting of SAF's finances to the Petitioners and institution of an audit. (Memorandum Opinion on Show Cause Re Temporary Receiver, App. F, *infra*, pp. F1-F10)

Trial in the consolidated cases did not occur until nearly one year later. Prior to trial, Petitioners filed a Motion for Summary Judgment seeking dismissal of the defamation case. Petitioners asserted that Respondents' complaint had not alleged with specificity the defamatory statements, had not alleged actual malice, and had failed to make a showing of damages by affidavit or otherwise. Petitioners' motion also asserted that statements made up to that date by Petitioners were protected under the First Amendment to the U.S. Constitution, that the statements enjoyed a qualified privilege, and granting the Motion would be the only action consistent with the past decisions of this Court.

Trial court Judge Howard had been preassigned to the cases. The court on several occasions continued consideration of Petitioner's summary judgment motion. At the commencement of trial on October 28, 1985, no showing of damages had been presented by the Respondents and Petitioners renewed their motion for dismissal. Petitioners repeatedly renewed their motion, but the court waited until February, 1986, in the middle of trial to deny it.

Petitioners also moved the trial court to shift the burden of proof to Gottlieb and the trustees on the grounds that a *prima facie* showing was made that they had breached their fiduciary duty. The court repeatedly continued the motion and ultimately never considered it.

The trial was without a jury. After trial was underway for approximately two weeks, Petitioners' counsel was seriously injured in an accident and trial was continued until March 1986. At the conclusion of the Petitioners' case, the trial court dismissed many of the allegations against Gottlieb such as the prison salary,

mainframe computer purchase, business with Gottlieb companies, wife's travel expenses to visit Gottlieb in prison, the failure to award sweepstakes prizes, and the postal permit submission, deciding that all fell within the business judgment rule in conducting SAF's affairs and/or that Petitioners had not met their burden of proof (Findings of Fact and Conclusions of Law, App. D, *infra*, pp. D1-D36).

The court required that Respondents defend the allegations concerning the building transaction, the book royalties, and the family members on the SAF payroll.

After a total of twenty-nine days of trial, the Court found that the remaining allegations against Gottlieb were without merit, that the building transaction and book royalties fell within the business judgment rule, and that Petitioners had been unable to meet their burden in establishing that the other alleged events occurred or were improper.

The court found against the Petitioners on the issue of defamation. Judge Howard postponed awarding a monetary judgment and advised that the parties negotiate a settlement. The Petitioners were unwilling to forgo an appeal of the judgment as the court's condition would require, and so damages were awarded by the court in the amount of $25,000 in favor of Gottlieb and $5,000 in favor of SAF.[1] (Judgement and Injunction, App. E, *infra*, pp. E1-E8)

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1. Judge Howard initially awarded damages to the individual SAF trustees finding that they had been defamed, but after being reminded by counsel for both parties that the trustees had not claimed defamation nor sought damages, the Judge ordered that SAF would be awarded damages.

The court found that the Petitioners had "published *many* statements about Alan Gottlieb and SAF which were intentionally false statements of fact" (emphasis added). The only statements which the court identified as being false, however, were:

1. Statements that Petitioners had been fired and that they had questioned Gottlieb's improper activities. (App. D, pp. D22 and D23)

2. Attributing the Florida Attorney General's investigation of Gottlieb to the Florida Secretary of State. (App. D, p. D24)

The court found that "examples of the numerous instances" in which the Petitioners had abused their qualified privilege were:

1. Comparing Gottlieb to a "chicken thief" and referring to his "rape and plunder". (App. D, p. D25)

2. Requests that state attorneys general conduct an investigation of Gottlieb and SAF and then reporting on the investigations. (App. D, p. D25)

3. Inaccurate reporting of the Florida situation discussed *supra* at 9 § 2. (App. D, p. D26)

4. The mailing of postcards by one Petitioner to Gottlieb and his attorneys with a preprinted photograph of Alcatraz with the legend "Wish you were here". (App. D, p. D26)

5. The "treatment of the Trustees" when the Petitioners filed a civil RICO action against them, and publication of that fact in their local news media. (App. D, p. D26)

The above were the only specific instances of Petitioners' defamatory statements mentioned by the court. The court found that these statements were "illustrative of instances" of the abuse of the qualified privilege.

The court found that both SAF and Gottlieb were public persons and found that the Petitioners made defamatory statements willfully and with actual malice. The court found that the Petitioners were liable for damages to Gottlieb and SAF:

> . . .only for false and defamatory statements published relating to subjects or published to persons outside the scope of the qualified privilege.

The Petitioners filed in a timely manner on November 5, 1986, a notice of appeal before the Washington State Appellate Court, Division I. The Petitioners appeal before the lower court included not only the issues of defamation, but the breach of fiduciary duty and self-dealing matters of Gottlieb and the trustees, as well.

On June 7, 1988, the American Civil Liberties Union of Washington (hereinafter "ACLUW") moved the appellate court for leave to file an *amicus curiae* brief on behalf of Petitioners on the issue of defamation. The motion was granted.

Both Petitioners and the ACLUW argued in their respective briefs and orally that the findings of defamation were vague, that the findings were in violation of the First Amendment and controlling decisions of this Court, that no actual malice was proved and no actual damages established. The court was asked to independently review the evidence for findings of actual malice.

In addition, both parties asserted that the trial court erred in denying the Petitioners' motion for summary judgment prior to trial.

On June 21, 1988, the Washington Appeals Court heard oral argument on the issues before it. On January 17, 1989, the appellate court affirmed in totality the decisions of the trial court. (App. A, p. A1)

On March 30, 1989, the Petitioners filed a timely petition for review before the Washington State Supreme Court; Petitioners were then represented by the same counsel as had represented the ACLUW. (App. B, p. B1)

On June 6, 1989, the Washington Supreme Court denied the Petitioners' petition for review without comment. (App. C, p. C1)

On August 24, 1989, the Petitioners filed before this Court a motion for an extension of time to file this petition for writ of certiorari. Petitioners are appearing before this Court *pro se*.

REASONS FOR GRANTING THE WRIT

This Court should issue a Writ of Certiorari based upon the grounds specified in Rule 17.1(c). The Washington State Appeals Court's affirmation of the trial court's decision directly conflicts with existing opinions of this Court and with the First Amendment to the U.S. Constitution.

Amendment IV to the U.S. Constitution makes the First Amendment applicable to the states. *New York*

Times Company v. L.B. Sullivan, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412.

The trial court did not find the necessary elements to establish defamation, actual malice, and actual damages, in a constitutionally consistent manner. The appellate court failed to review the trial court record in the way mandated by this Court; such a review would have shown the the trial court's decision to be in fundamental conflict with the Constitution and with every ruling of this Court on defamation since 1964.

This Court has, in considering decisions which may conflict with the Constitution, itself undertaken review of the evidence:

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain those principles have been constitutionally applied.

Id., 95 A.L.R.2d 1412 at 1437. This is such a case.

A. The Appellate Court failed to conduct a *de novo* review of the trial court record at least on the issue of actual malice once it was established that the Respondents were public figures.

The Court found most recently in *Bose Corp. v . Consumers Union of U.S. Inc.*, 466 U.S. 485, 80 L.Ed.2d 502, 104 S.Ct. 1949, that the appellate court has an obligation to make an independent review of the record:

> [W]e have repeatedly held that an appellate court has an obligation to "make an independent

> examination of the whole record" in order to make sure "that the judgment does not contitute a forbidden intrusion on the field of free expression." (citations omitted)

80 L.Ed.2d 502 at 515. This Court further found in *Bose*:

> The New York Times rule emphasizes the need for an appellate court to make an independent examination of the entire record. . .
>
> * * *
>
> For the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.

Id. at 516.

The instant action mirrors the *Bose* case, especially in the way in which the trial court found actual malice. Only conclusions were offered by the trial court, not evidence of malice. In *Bose, supra*, the District Court did not believe a Consumer's Union product tester's testimony and inferred malice from that disbelief:

> Notably, the District Court's ultimate determination of actual malice was framed as a conclusion and was stated in the disjunctive . . .the District Court did not identify any independent evidence that Seligson realized the inaccuracy of the statement, or entertained serious doubts about its truthfulness, at the time of publication. (footnote omitted)

Id. at pp. 514-515. The Court's ruling in *Bose* was simply an extension of the landmark 1964 case, *New York Times Co., v. Sullivan, supra*, where the Court elaborated on the malice standard in public official defamation actions:

> We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. (footnote omitted)

95 A.L.R.2d at 1436.

This Court has found that falsity of statement is insufficient to find actual malice:

> . . .liability requires proof of reckless disregard for truth, that is, that the defendant "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968)

Anthony Herbert v. Barry Lando, et al., 441 U.S. 153, 60 L.Ed.2d 115, 122, 99 S.Ct. 1635. The record is absent any such evidence. The Petitioners then, and now, believe that the allegations made in court and the statements they published in their newsletter, *Up in Arms!*, are true.

B. The Appellate Court erred by affirming the damage award since insufficient or no evidence was introduced at trial establishing actual damages, and the trial court failed to distinguish between damages caused by the alleged defamatory statements and those damages caused by privileged statements or by the adverse publicity from Gottlieb's conviction and incarceration.

This Court has established that in public figure defamation cases, damages may only be awarded only when there is a finding of actual malice. *New York Times Co., v. Sullivan, supra* at 1436. See also, *Gertz v. Robert Welch, Inc.*, 94 S.Ct. 2997 (1974), 418 U.S. 323, 41 L.Ed.2d 789.

As noted above, the trial court's decision was defective since it cited no evidence of malice. It is improper to award damages on the basis of "ill will, evil motive, intention to injure" or other motivation. *Rosenblatt v. Bauer*, 383 U.S. 75, 15 L.Ed.2d 597, 604, 86 S.Ct. 669. *Cf. Hustler Magazine v. Falwell*, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

Without a finding of actual malice, Respondents are not entitled to any damages whatsoever given that they are public figures. Even with a finding of actual malice, evidence must also be presented to support an award of compensatory damages. *Gertz v. Welch, supra*, 94 S.Ct. 2998, 3012.

If malice is found, only actual damages established by the evidence and directly attributable to the defamation may be awarded. *Id.* at 3012. In this action, the trial court refused to admit testimony of Respondents' expert witness on the issue of damages because of the

Respondents' refusal to allow examination of the underlying data; no other evidence of actual damages was introduced. Nonetheless, the court made a finding that actual damages had been sustained by Respondents.

There was a total failure by the court to distinguish between damages suffered the Respondents which were claimed to be a result of defamatory statements, and damages suffered because of statements that were true or privileged. Moreover, the court failed to segregate such damages from those damages caused the Respondents by enormous publicity surrounding the conviction and jailing of Gottlieb on federal charges of income tax evation.

The court itself noted in Finding of Fact No. 67 (App. D, *infra*, p. D25):

> A substantial or significant portion of the claimed defamation damage or loss would have occurred to Alan Gottlieb and SAF as a result of publication of statements in those areas in which the plaintiffs did have a qualified privilege to fairly report.

Counsel for SAF (who served as Gottlieb's counsel on the federal tax charges) themselves noted in Gottlieb's Defendant's Sentencing Memorandum in that case:

> The government's purposes have been served beginning with handing out press releases. . .in assuring that maximum publicity be generated.
>
> * * *
>
> The stigma of this case will forever remain with Mr. Gottlieb. It will affect his future livelihood as well as his future personal life.

(Trial Exhibit #382 at p. 4)

While Gottlieb was serving out that sentence, the same counsel filed a Memorandum in Support of Motion to Reduce Sentence (Trial Exhibit #383) less than three weeks before the onset of this action. They reported that Gottlieb and SAF had suffered great damage as a result of Gottlieb's conviction, his absence from his businesses, and the adverse publicity surrounding the conviction:

> The defendant [Gottlieb] has already been punished not only by imprisonment and the imposition of a fine but by *significant harm to his public reputation* -- an important consideration in light of the defendants's many public activities. (emphasis added)
>
> * * *
>
> In the instant case, the various enterprises operated by Alan Gottlieb have already been noticeably harmed by his absence.

Memorandum at p. 3

Without a segregation of damages, the trial court's damage award is inconsistent with the requirements set forth by this Court.

C. The Appellate Court erred in affirming the trial court's general, non-specific, findings of defamation, and findings that opinions were defamatory. The court also erred in affirming the trial court's finding that a statement was defamatory when it had been found to be true by another trial court.

The trial court, in its Findings of Fact and Conclusions of Law (App. D, *infra*.), that "many" statements were defamatory, but identified only two as being false and only five instances where Petitioners had abused their qualified privilege. *Supra* at p. 9.

These generalized allegations of defamation haunted Petitioners throughout the course of the litigation since the lack of specificity made it impossible to respond with any kind of precision.

Petitioners publicized that they had been fired. Judge Robert W. Winsor, after eight days of live testimony in a show cause hearing, found this statement to be true (App. F, *infra*, at F1). Yet Judge Howard found it to be false. Petitioners repeated the statement found to be true by one judge regarding their firing many times, and were found by a different judge to have defamed the Respondents with that finding.

The Petitioners' report in *Up in Arms!* to SAF members that Gottlieb was being investigated by the Florida Secretary of State's office for mail fraud was found to be false and defamatory. Yet the gist of the report *was* true; Petitioners had simply confused government agencies: The Florida Secretary of State was investigating Gottlieb's failure to register as a charitable fundraising organization, while the Florida *Attorney General* was conducting the mail fraud investigation.

This Court has found that while regrettable reporting errors on matters of public debate do occur, they are not libelous:

> That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need. . .to survive." (citations omitted)
>
> * * *
>
> Just as factual error affords no warrant for repressing speech that would otherwise be free, the same is true of injury to official reputation.
>
> * * *
>
> If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.
>
> * * *
>
> A defense for erroneous statements honestly made is no less essential here. . .

New York Times v. Sullivan, supra, at 1431. Also, *Gertz, supra* at 3007. In *Herbert v. Lando, supra*, at 131, the Court found:

> Realistically. . .some error is inevitable; and the difficulty in separating fact from fiction conviced the Court in New York Times, Butz, Gertz, and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue

self-censorship and the suppression of truthful material.

D. The Appellate Court erred in affirming findings that statements of opinion or antecdotes, the reporting of requests of government investigations, and the filing of legal actions, were all defamatory.

The other allegedly defamatory statements found to have been an abuse of privilege included comparing Respondent Gottlieb with a "chicken thief" and referring to Gottlieb's "rape and plunder" of SAF. These were statements of opinion and purple prose designed to arouse interest in and support for the Petitioners' legal battle. Such statements cannot be defamatory.

This Court has repeatedly found that "there is no such thing as a false idea." *Gertz, supra* at 3007.

> . . .debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

New York Times, supra at 1430.

It is understood that referring to Gottlieb as a "chicken thief" did not imply he actually stole chickens, but rather was antecdotal. Such statements are protected under the First Amendment. *Hustler, supra* at 878.

Although Respondents plead in their complaint that the mere filing of the Petitioners' complaint against Gottlieb for self-dealing and breach of fiduciary duty,

was itself libelous, initiating legal action is an unqualified privilege:

> . . .[T]he [defamation] defendants were aware that the mere fact of filing, and disseminating to the media and the public, the claims in the Complaint would cause immense and irreparable injury to the Foundation. Knowing their lawsuit to be without merit, the defendants are using it as a device to disseminate, insulated from liability for slander and libel, allegations which are designed to, and will injure, the Foundation.

(Second Amended Complaint, CP149, at p. 12)

The same privilege would apply to the Petitioners' complaint under the RICO Act against the trustees. Reporting to SAF members who supported Petitioners' legal action that the complaint had been filed is afforded a qualified privilege. No evidence was before the trial court that what was reported was false, but rather the complaint was that the mere reporting of the RICO action was embarassing to them. This is not actionable and both the finding and damages awarded conflict with the First Amendment.

E. The Appellate Court erred in affirming the trial court's finding that statements made to the Respondents and their counsel, but not to the public or any third party, are defamatory.

One of the Petitioners mailed a postcard to Gottlieb and his counsel. The postcard depicted a photograph of Alcatraz and had the pre-printed slogan "Wish you were

here". The trial court found this to be an abuse of the Petitioners' qualified privilege and to be defamatory.

Statements made to a party and only to that party cannot be "defamatory" since there could be no diminished reputation in the eyes of the public or others. The card, while in bad taste, was on the order of the Falwell parody (albeit much milder in tone and suggestiveness) which this Court found to be not actionable in *Hustler v. Falwell, supra.*

Moreover, since Gottlieb was already in prison and was an adjudicated felon, the suggestion that that he be housed in Alcatraz does not worsen his reputation, especially since the suggestion was directed at Gottlieb himself.

For the Alcatraz postcard to be defamatory, it must contain some false statement of fact. It did not contain fact at all. In *Hustler*, when examining the magazine's suggestion that Rev. Falwell had consummated an incestuous relationship with his mother in an outhouse, the Court found at 882:

> We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice". . .

F. The Appellate Court erred in affirming the trial court's denial of Petitioners' motion for summary judgment before trial.

A review of the Respondents' complaint and amended complaints reveals a failure to allege specific defamatory acts, a failure to show malice, and a failure to make a showing of actual damages.

These important elements are simply missing from the complaint, yet the trial court refused to hear the Petitioners' motion for summary judgment before trial and then denied the motion during the trial.

In fact, the original defamation complaint was filed prior to the publication of Petitioners' publication *Up in Arms!* and was predicated on the premise that the filing of the Petitioners' complaint was itself defamatory.

Summary judgment motions serve an important purpose in First Amendment cases. Allowing general allegations of defamation to be made without identifying those specific statements places defamation defendants in an untenable position and stifles free speech.

In public figure cases, *prima faciae* showings must be made of actual malice and of actual damages. This was not done in this action.

CONCLUSION

For the forgoing reasons, this petition for a writ of certiorari should be granted.

DATED this 29th date of September, 1989.

Respectfully submitted,

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Appendix A
Memorandum of the Washington State Appeals Court

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

GREGORY R. McDONALD; WILLIAM L. GARRISON, JR.; SAMUEL J. BASSO; COLLEEN McDANELD; SANDRA S. BAXTER; and DOUGLAS J. ZIMMER, Appellants, v. THE SECOND AMENDMENT FOUNDATION, a Washington nonprofit corporation; ALAN M. GOTTLIEB; JEFFREY D. KANE; JOHN M. SNYDER; WILLIS HOBART; and SAM SLOM, Respondents.	)	NO. 19422-4-I Filed: Jan 17 1989
THE SECOND AMENDMENT FOUNDATION, a Washington nonprofit corporation; and ALAN M. GOTTLIEB, Cross Appellants, v. GREGORY R. McDONALD; WILLIAM L. GARRISON, JR.; SAMUEL J. BASSO; COLLEEN McDANELD; SANDRA S. BAXTER and JOHN DOE BAXTER, her husband and the marital	)	

community composed thereof;)
and DOUGLAS J. ZIMMER and)
JANE DOE ZIMMER, and the)
marital community composed)
thereof,)
Cross Respondents.)
)

GROSS, J. -- This action was initially brought by former employees[1] and persons claiming membership[2] in the Second Amendment Foundation (SAF) against Alan Gottlieb and the trustees[3] of SAF. The complaint alleged a number of wrongdoings by Gottlieb, primarily self-dealing, and certain breaches of fiduciary duties on the part of the trustees in exercising, or not exercising, their responsibilities to the corporation. Gottlieb and SAF counterclaimed for defamation. Gottlieb, individually, counterclaimed for damages for the tort of outrage and for invasion of privacy.

SAF is a Washington nonprofit corporation. Among its purposes, according to the articles of incorporation

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1. Gregory R. McDonald was the executive director of the Second Amendment Foundation (SAF) from October 1981 through August 31, 1984. William L. Garrison, Samuel J. Basso, Colleen McDaneld, Sandra Baxter and Douglas Zimmer were SAF employees working under McDonald through August of 1984. These individuals along with Glenn R. Anderson and D. Bruce Moriarity will be referred to in the opinion as McDonald, the McDonald group, or appellants.

2. Glenn R. Anderson and D. Bruce Moriarity were contributors to SAF. They received "membership cards" from SAF.

3. The trustees of the Second Amendment Foundation involved in his litigation include Alan Gottlieb, Jeffrey D. Kane, John Snyder, Willis Hobart and Sam Slom. They will be collectively referred to in the opinion as the trustees.

and other public statements, are the promotion and protection of the rights of gun owners, the education of the general public in these rights, and engaging in test cases or providing support for litigation in connection with a citizen's right to keep and bear arms as allegedly protected by the Second Amendment to the United States Constitution. SAF solicits contributions which are the main source of income to the foundation.

In addition to SAF, this case involves other organizations which have a significant relationship to each other and to perceived rights under the Second Amendment. These organizations, namely, the Center for the Defense of Free Enterprise (CDFE) and the Citizens Committee for the Right to Keep and Bear Arms (CCRKBA), share purposes and objectives, sometimes share personnel, and have, or had, the same individuals on the various boards of trustees. Like SAF, these organizations depend on the solicitation of funds for their financial existence and well being.

Alan Gottlieb was the incorporator and dominant driving force behind these organizations. At all times relevant to this case, Gottlieb had a significant voice in, and established the basic policies for, the organizations. Gottlieb has at times also had a majority ownership interest in at least three other private businesses[4] which have conducted business transactions with SAF. At times these businesses have had relatives of Gottlieb in their employ.

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4. These businesses are: Merril Maillng Marketing, Inc. (direct mail solicitation); Merril Associates (fundraising consultant and broker of lists of names used in direct mail solicitation); and Royal Printers, Inc. (a print shop).

Before being made executive director of SAF, Greg McDonald worked for CDFE. He was made executive director of SAF in October of 1981. As executive director of SAF, McDonald had access to and reviewed SAF financial transactions, annual reports, presented proposed annual budgets to the board of trustees, prepared the text of fundraising mailings, and was generally responsible for overseeing the day-to-day SAF operations in conjunction with Gottlieb.

The appeal and cross appeal result from a major "corporate battle" for control of SAF between (1) the Gottlieb/SAF group, with Gottlieb as the controlling or dominant figure in SAF and SAF's board of trustees, as respondents/cross appellants, and (2) the above named former employees, contributors, and the former executive director of SAF, Greg McDonald, who was the controlling and dominant figure in the appellants'/cross respondents' group.

The allegations by the McDonald group that Gottlieb was self-dealing and that there were serious breaches of fiduciary duties by the action or inaction of the trustees of the foundation stem from several areas. These include allegations that: the actions surrounding the purchase of the Liberty Park office complex, where the foundation and related entities are headquartered, were done in such a way to personally benefit Gottlieb and at a detriment to the foundation; improper nepotism at cost to the foundation; improper payment of Gottlieb family travel expenses; the illegal continued work by, and payment of salary to, Gottlieb while he was incarcerated at a federal work release facility; utilization of foundation resources by Gottlieb's businesses, especially computer resources, at little or no cost to the businesses; and payment by the foundation for expenses of Gottlieb's businesses and of non-foundation employees;

foundation payment of Gottlieb's personal legal expenses; and the expenditure of foundation time and expense for book writing, for which Gottlieb got personal credit and all royalties, resulting in no ascertainable benefit to the foundation. McDonald also alleged that Gottlieb and the foundation breached his employment contract and discharged him wrongfully.

After McDonald was fired, he and his coplaintiffs started an organized group styled as "Save SAF", "Save the Second Amendment Foundation", and "Save SAF Committee". Using these names, they prepared and disseminated letters and other written materials discussing the situation and voicing their allegations. In addition, they held news conferences, solicited contributions from former SAF contributors, and invited investigations of SAF and Gottlieb by various state attorney's general. These organizations have used mailing lists and lists of contributors belonging to SAF which were obtained while these people were employed by the SAF.

This matter was tried to the court sitting without a jury. At the conclusion of the plaintiffs' case, all claims against the defendants were dismissed, except for the allegations relating to the real estate transaction the claimed collection and retention of book royalties by Gottlieb on the book, *The Rights of Gun Owners*, the "nepotism" claims, and the breach of employment contract claim by McDonald against SAF.

On completion of the trial, the trial court found, in part, that there was no self-dealing on Gottlieb's part as to the real estate transaction, and that to the extent that the trustees were not fully informed as to the transaction they retained the authority to affirm or reject the entire real estate transaction after being fully informed of all the tax and business consequences. Thus, the court

determined that this claim was not actionable. The court also determined there was no breach of any employment contract by the foundation or Gottlieb as to McDonald; that the decision of the trustees to allow Gottlieb to retain any book royalties was a legitimate business decision and properly within the discretion of the trustees; and that those family members who have been paid by SAF did, in fact, perform work for the remuneration paid by the foundation. Further, the McDonald group was permanently enjoined from the use of the names using the terms the "Second Amendment Foundation," or SAF in them, or from using membership or contributor lists derived from SAF materials. Additionally, the trial court determined that Gottlieb and SAF had suffered damages of $25,000 and $5,000 respectively for defamation.

From these rulings the McDonald group appeals, making 52 assignments of error to the findings and conclusions. Gottlieb and SAF make an additional 13 assignments of error on cross appeal. Most of the issues on the appeal and cross appeal are questions of whether substantial evidence exists to support the findings of the trial court. The important question, however, is whether the trial court erred in awarding damages for defamation to Gottlieb and the SAF.

DEFAMATION CLAIM

Gottlieb and the SAF had the burden to establish the existence of the four essential elements of defamation:[5]:

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5. The McDonald group initially tries to appeal from the denial of a summary judgment following a trial on the merits held after the denial. The recent case of *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988) holds that a denial of a summary judgment is not appealable after a trial on the merits has been held. *See also* RAP 2.2; *Morgan v. American Univ.*, 534 A.2d 323 (D.C. 1987).

(1) falsity; (2) an unprivileged communication; (3) fault; and (4) damages. *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), *cert. denied*. 457 U.S. 1124 (1982); see also *LaMon v. Butler*, 110 Wn.2d 216, 220, 751 P.2d 842 (1988), reconsideration granted (July 6, 1988). If a plaintiff is a public figure or public official, then the level of defendant's fault that must be shown is actual malice. *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964). Here, there was no doubt as to Gottlieb's or SAF's "public" nature, the trial court so found (finding of fact 15), and there has been no appeal taken from that finding.

Some statements, although otherwise defamatory, are privileged.

> Occasions making a publication conditionally privileged afford a protection based upon a public policy that recognizes that it is essential that true information be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons or certain interests of the public. In order that the information may be freely given, it is necessary to afford protection against liability for misinformation given in an appropriate effort to protect or advance the interest in question.

Restatement (Second) of Torts § 592A, at 258 (1977). Two conditional or qualified privileges are involved in this case. First, the publication of a statement is conditionally privileged "if the circumstances lead any one of several persons having a *common interest* in a particular

subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know." (Emphasis added.) Restatement (Second) of Torts § 596 (1977). Second, a conditional privilege exists if

> the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important public interest, an
>
> (b) the public interest requires that communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if defamatory matter is true.

Restatement (Second) of Torts § 598 (1977).

A qualified privilege protects the declarant from liability for an otherwise defamatory statement unless the privilege is abused. *Bender v. Seattle*, 99 Wn.2d 582, 600, 664 P.2d 492 (1983); *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 341, 760 P.2d 368 (1988). *See also* Restatement (Second) of Torts § 599, at 286 (1977). An abuse of the qualified or conditional privilege is shown by proof of the publication of defamatory material with actual malice. *Caruso v. Local 690, Int'l Bhd. of Teamsters*, 107 Wn.2d 524, 530-31, 730 P.2d 1299, *cert. denied*, ___ U.S.__, 98 L. Ed. 2d 31, 108 S. Ct. 67 (1987). To show actual malice, a defamation plaintiff must prove that the declarant knew the statement was false, or acted with a high degree of awareness of its probable falsity, or in fact entertained serious doubts as to the statement's truth. *Herron v. King Broadcasting Co.*, 109 Wn.2d 514, 523, 746 P.2d 295 (1987) (Herron II), *reconsideration granted* (July

12, 1988).

McDonald contends the trial court erred in concluding that the "Save SAF" group abused its qualified privilege because the court premised its finding of reckless disregard on evidence of the group's negligence, rather than on evidence of actual malice. We disagree. In its oral opinion and in the written findings and conclusions, the trial court found that by reason of the McDonald group's association with the SAF, the group had a qualified and conditional privilege to publish information to the SAF contributors and to the media about SAF and Alan Gottlieb. Therefore many of the statements published by the McDonald group were within a qualified privilege.

However, the trial court would not extend the qualified privilege to include all statements published by the McDonald group. Specifically the court found by clear and convincing evidence that the defamation defendants knew that statements regarding a Florida Secretary of State investigation and the termination of their employment with SAF were false. The court further found that the publication of many other statements was a result of reckless disregard as to whether the statements were false or misleading. These findings and conclusions made by the trial court with respect to the abuse of the qualified privilege, and the conclusion as to actual malice, are supported by substantial evidence.[6]

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6. The general rule is that a trial court's findings of fact will be upheld on appeal so long as they are supported by substantial evidence in the record, even though there may be some evidence supporting a contrary view. *State v. Thetford*, 109 Wn. 2d 392, 396, 745 P.2d 496 (1987); *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 732 P.2d 974 (1987). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded individual of the truth of the stated premise. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). In turn, appellate review of

SUFFICIENCY OF AWARD

On cross appeal, Gottlieb and SAF challenge the trial court's determination of the amount of the award. They contend the court failed to award adequate damages for defamation. Further, they argue that the defamation plaintiff, SAF, is entitled to substantial "presumed damages". Under Washington law, damages are presumed to flow from a defamatory communication if the communication is published with actual malice. *Caruso v. Local 690, Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 354, 670 P.2d 240 (1983). Because there was a finding of actual malice, SAF and Gottlieb could have been awarded presumed damages absent any proof of actual injury or damages. However, the trial court found for the defamation plaintiffs on a theory of proof of actual injury and damages. SAF and Gottlieb fail to cite or adequately brief authority for the proposition that presumed damages must be awarded where there is an award based on actual damages. Without adequate authority or briefing, we will not make such a significant change in this state's defamation law. *See generally In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). Moreover, the amount of presumed damages would be discretionary with the trial court. As there was a determination of damages in this case, unless it can be shown that the damages are inadequate or the trial court abused its discretion, we will not overturn its decision. The trial court did not abuse its discretion in

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(Continued)

challenged conclusions of law is limited to determining whether the findings support the conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986); *Goodman v. Darden, Doman & Stafford Assocs.*, 100 Wn.2d 476, 670 P.2d 648 (1983).

making the award. Although Gottlieb and SAF claim they proved more that the damages awarded, this court will not overturn the amount if it is in a reasonable range covered by the testimony. Defamation damages are difficult to quantify and may necessarily involve estimation or speculation. *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 580 P.2d 642, *review denied*, 91 Wn.2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979). There was evidence of actual damage presented and the trial court limited the award because a substantial portion of the damage was brought about by publication of statements in the areas in which the McDonald group had a qualified privilege to report.[7] After a review of the record, we agree with the trial court and find the damages awarded are within the range of the evidence presented and therefore adequate.

ABUSE OF DISCRETION IN EXCLUDING EVIDENCE

On cross appeal, Gottlieb claims the trial court did not admit evidence critical to prove the actual damages that he and SAF suffered; specifically, the testimony of economist John Finch relating to losses suffered by SAF as a result of the McDonald group's use of the mailing and contribution list. The trial court excluded the testimony and proposed exhibits relating to the lists and other computer data pursuant to ER 1006, which provides:

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7. When it is possible to sever the harm done by the privileged communication from that done which goes beyond the privilege, the defamation defendant(s) are subject to liability only for so much of the total harm as found to be due to the unprivileged matter. Restatement (Second) of Torts § 605A, comment (b), at 296-97 (1977).

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

"The proponent of the summary must make a foundation showing that the opposing party had notice and a reasonable opportunity to inspect and copy the underlying materials." (Footnote omitted.) 5A K. Tegland, Wash. Prac., *Evidence* § 496, at 381 (1982).

The testimony of Finch would have been based on computer data, the original of which SAF initially refused to disclose. At trial, SAF's counsel indicated SAF would not provide the original data or tapes if McDonald had an opportunity to work with them, and that if this was the only means to permit the summaries of the data to be entered into evidence, SAF would elect not to rely on these exhibits. Later, in the waning minutes of the trial, SAF decided it would provide the materials, but only at the foundation headquarters, on its computer, and under supervision. SAF and Gottlieb could not give the court any assurance that this could be done within a short period of time. The trial court did not err in finding this offer untimely and excluding the testimony or the evidence.

QUESTIONS OF SUBSTANTIAL EVIDENCE

Among their challenges, appellants challenge 32 findings of fact and 18 conclusions of law. Ten findings

(numbers 17 through 19 and 21 through 27) and six conclusions (numbers 12, 13, 14, 16, 18, and 25) were in the area of defamation which is discussed above. Most, but not all, of the other assignments of error as to the findings (introductory paragraph and findings 18, 19, 23, 25, 28, 29, 31, 32, 34, 35, 40, 42, 43, 47, 50, 59, 72, 73, and 74) and conclusions (numbers 5, 6, 7, 8, 20, and 21) deal with the issues of business judgment, fair compensation for work done and equipment used, salary at the time Gottlieb was incarcerated, educational expenses, travel expenses, royalties, attorney's fees, sweepstakes prizes, Liberty Park real property purchase, leasing and business transactions, firing of employees, fund diversions, trustee's good faith, and membership and voting rights. After a review of the record, we find overwhelming support for the trial court's factual findings and conclusions of law.

INJUNCTION

The McDonald group contends the trial court erred in enjoining it from referring to, or using SAF's name or similar names in the group's name.[8] Additionally, the injunction included an order for the return of various documents taken from SAF headquarters while McDonald was still employed, and those acquired by the McDonald group as a result of the discovery process.

The granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised according to circumstances of each case. On review an appellate court must determine whether the trial court's decision was based on untenable grounds or

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8. Appellants' assignments of error 31, 45, 46, 48, 49.

was manifestly unreasonable or arbitrary. *Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 721 P.2d 946 (1986). *See also Brown v. Voss*, 105 Wn.2d 366, 715 P.2d 514 (1986).

Here, the McDonald group contend the granting of the injunction was an abuse of discretion, but do not cite persuasive authority, nor make a persuasive argument, showing any abuse by the trial court. We will not overturn the court's decision.

DISQUALIFICATION OF FIRM

The McDonald group also contends the trial court should have disqualified LeSourd & Patten as attorneys for SAF.[9] This contention is based on a claimed violation of the Rules of Professional Conduct, specifically the rule against a resulting conflict of interest where trial counsel is called as a witness at trial. RPC 3.7. However, at trial, McDonald and his counsel did not object to the testimony of Mr. Hard of LeSourd & Patten. Moreover, McDonald's counsel admitted that *his* calling Hard as a witness qualified as an exception. RPC 3.7(c). In addition, SAF called Hard to identify a proposed court order from an earlier hearing to which McDonald would not stipulate. This is permitted under RPC 3 .7 (a). There is no merit to this argument.

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9. Gottlieb was represented at trial by the firm of Essenburg & Staton.

REMAINING ISSUES ON CROSS APPEAL

Included in Gottlieb's/SAF's second amended complaint was the issue of damages for theft and unauthorized use of SAF's contributor and mailing lists. However, we find no evidence or testimony in the record where these claims, including the claim of a violation of the Consumer Protection Act (RCW 19.86 *et seq.*) were argued as such to the trial court.[10]

With respect to SAF's contention that the McDonald group violated an employee's fiduciary duties to an employer by the unauthorized use of the lists, at the time these violations supposedly occurred, the "employees" were no longer in the employ of the foundation, and no employment contracts or covenants not to compete were shown to exist. Gottlieb/SAF also assert that using the mailing and contributor lists is a violation of the Uniform Trade Secrets Act (RCW 19.108 *et seq.*) but, at trial, Gottlieb and the foundation failed to prove the lists were in fact "trade secrets". Additionally, Gottlieb/SAF failed to prove that the "Save the Second Amendment Foundation" group was a "charitable organization" under RCW 19.09 *et seq.* No findings were entered on these issues, even though it was SAF's attorneys who prepared the findings and conclusions. These arguments are without merit.

DISCRETION IN AWARDING FEES AS COSTS

The court requested "*that in the course of its next audit*" the accountants for the foundation investigate some of

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10. The record shows these arguments were couched in terms of the actual damages to be proved as a result of the defamation.

the claims made by the McDonald group. Gottlieb/SAF cite the case of *Fiorito v. Goerig*, 27 Wn.2d 615, 179 P.2d 316 (1947), for the proposition that it may be appropriate to require the losing party to bear the cost when the court appoints an expert. We disagree with Gottlieb's/SAF's interpretation of the case. The holding in *Fiorito* is that in cases dealing with partnership dissolutions and accountings, where the court assumes jurisdiction and appoints an auditor to report to the court, the cost for the services are properly charged to the partnership. The case says nothing about a "losing party" and cites the general rule that fees and other items of expense in preparation for trial will be allowed only in the case of agreement between the parties or by virtue of specific authority. Here, there is no agreement and we have been cited to no specific authority that would require a losing party to bear the costs of this audit. The trial court did not err.

TORT OF OUTRAGE AND VIOLATION OF PRIVACY

Gottlieb contends the trial court erred by not awarding damages to him for the tort of outrage, and contends that he is entitled to damages for the invasion of privacy. We note that the trial court specifically rejected the proposed conclusion of law relating to outrage and violation of privacy because, as the court stated in finding of fact 67, a significant portion of the overall damage was a result of published statements which the McDonald group had a qualified privilege to report. Moreover, there was no proof offered as to actual damages as a result of these torts. Thus, we find that these claims have no merit.

APPORTIONMENT OF DAMAGES

Gottlieb and SAF contend the trial court erred in apportioning the percentage of damages between the defamation defendants. Gottlieb/SAF argue that joint and several damages should have been awarded against all the members of the McDonald group. However, it appears to the court that the issue is moot. The McDonald group represented to this court in briefing and oral argument that the total amount of the judgment has been paid into the registry of the court. SAF and Gottlieb have not contended otherwise. Therefore, we will not deal further with the issue.

MOTION TO STRIKE

Respondents' motion to strike appellants' reply brief/response to cross appeal due to its untimeliness is denied.

The decision of the trial court is affirmed.

/s/ Gross, J.

WE CONCUR:

/s/ Colman, HJ */s/ Scholfield, JP*

Appendix B
Petition for Review

Supreme Court Review No. _____
Court of Appeals No. 19422-4-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

GREGORY R. McDONALD; WILLIAM L. GARRISON, JR.; SAMUEL J. BASSO; COLLEEN McDANELD; SANDRA S. BAXTER; AND DOUGLAS J. ZIMMER
Appellants,

v.

THE SECOND AMENDMENT FOUNDATION, a Washington nonprofit corporation; ALAN M. GOTTLIEB; JEFFREY D. KANE; JOHN M. SNYDER; WILLIS HOBART; and SAM SLOM
Respondents.

PETITION FOR REVIEW

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U.S. Constitution, Amendment I 4

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Statutory Authority

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Appendices

Appendix A
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Appendix B
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I. IDENTITY OF PARTIES.

Appellants Gregory McDonald, et. al., ask the Supreme Court to accept review of the Court of Appeals' decision terminating review designated in Part II of this Petition.

II. COURT OF APPEALS' DECISION.

The petitioners seek to review the following portions of the Court of Appeals' decision filed on January 17, 1989:

(1) Their affirming the trial court's disallowing voting rights to members of The Second Amendment Foundation (SAF) ;

(2) Their failing to apply stringent standards in scrutinizing Alan Gottlieb's (Gottlieb's) self dealings on the "Liberty Park" Building that Gottlieb acquired through the use of Foundation money;

(3) Their use of the "substantial evidence test" to review the evidence in defamation cases involving public figures in affirming the trial court's finding of defamation;

(4) Their failing to even mention the clearly unconstitutional findings of defamatory acts of the trial court and failing to hold that those acts are protected by the U.S. Constitution, Amendment I, and the Washington Constitution, Article 1, § 5, and;

(5) Their failing to reverse the damage award so that damages would be reduced in light of the reversal of substantially or all the "defamatory acts" action;

(6) Their refusing to review the trial court's denial of McDonald/SAVE SAF's Motion for Summary Judgment on the defamation claim.

A copy of the Court of Appeals' decision filed on January 17, 1989, is attached (Appendix at A-1 to A-19). A copy of the Order Denying the Motion for Reconsideration filed on February 28, 1989, is attached (Appendix at A-20 to A-21).

III. ISSUES PRESENTED FOR REVIEW.

1. In the SAF Articles and Bylaws, there is no denial that there are members and no restriction on members' rights in the Articles of Incorporation and Bylaws. The Articles specifically have restrictions on members' rights. SAF solicits "members". Under RCW 24.03.065 and RCW 24.03.085, should SAF members have voting rights?

2. Should not the Liberty Park transaction wherein Gottlieb transferred SAF and Citizens Committee's office building to himself, be subjected to strict scrutiny and/or be set aside until the full membership has a chance to review the transaction?

3. The following acts were found to be defamatory against public figures Gottlieb and SAF by the trial court:

a) From Alcatraz, a post card sent Gottlieb who had just been sentenced to prison for income tax evasion saying "Wish you were here".

b) *Up in Arms*, the newspaper run by McDonald/SAVE SAF criticized Gottlieb's use of SAF monies for his personal benefit. The

authors metaphorically referred to Gottlieb as a "chicken thief" who was raping and plundering SAF.

c) Plaintiffs made requests for investigation by state attorney's general, reporting of these investigations and publicizing the filing of a RICO action. [FF 70]

Yet lower appellate court failed to specify these trial court findings in its opinion let alone rule on these utterances except in a general way.[1] Shouldn't the court rule that these utterances are protected speech under Washington Const. Art 1 § 5 and the First Amendment to the United States Constitution (hereinafter referred to as "The First Amendment")?

4. The lower appellate court affirmed the trial court's finding that McDonald/SAVE SAF had defamed Gottlieb by inaccurately reporting that the Florida Secretary of State, instead of the Florida Attorney General, was investigating Gottlieb. The "sting" of the articles was true: a Florida agency was investigating Gottlieb and SAF. It was not material whether it was the Secretary of State or the Attorney General. Shouldn't this Court rule that since the "sting" was true, the trial court's decision in the finding of defamation must be reversed?

5. The trial court's finding that the McDonald/SAVE SAF have falsely published that they

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1. At oral argument, counsel for Gottlieb/SAF conceded that the trial court erred in finding that the chicken thief reference or Alcatraz postcard defamatory since they were constitutionally protected. Yet the lower appellate court fails to even reach these findings except to say "that the publications of many other statements was a result of reckless disregard. . ." Decision at 10.

were fired for specified reasons[2] was reviewed using the general "there was substantial evidence for the court's findings" test. Shouldn't the Court independently review the decision of the trial court (as required by The United States Supreme Court) to determine if there was clear and convincing evidence that the utterance was a false fact versus a mistaken opinion and if a false fact, whether the utterer said these statements with "actual malice" when a public figure is the defamatory plaintiff?

6. The lower appellate court refused to review the McDonald/SAVE SAF's motion for summary judgment. Isn't this refusal contrary to the intent of RAP 2 .2 and RAP 2 .4 and in violation of federal and state constitutional standards for appellate review of trial court decisions in defamation cases involving public figures?

7. Since the lower appellate court failed to acknowledge that the trial court erroneously found defamation regarding protected speech, they never reexamined the damages. Shouldn't the damage award be reduced substantially and/or set aside in view of the unconstitutional basis for the award?

8. The lower court relied on private defamation cases (e.g., *Caruso I* and *Caruso II*) allowing "presumed damages. Shouldn't the court require a showing of "actual damages in public figure cases?"

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2. Finding of Fact #55 reads as follows: "Defamation of defendants also published that Mr. Gottlieb had fired the entire senior staff of SAF (1) 'for questioning illegal activities' (2) because they had 'become aware of numerous and proper and possibly illegal activities concerning the handling of Foundation funds,' and (3) because they had resisted various illegal and unethical activities by Mr. Gottlieb. These statements were not true."

IV. STATEMENT OF THE CASE

The Second Amendment Foundation (SAF) is a Section 501(c)(3), Washington nonprofit corporation. Alan Gottlieb is SAF's dominant and controlling force. The SAF Board of Trustees were all hand picked by Mr. Gottlieb and, with one exception, served as trustees since the incorporation of SAF in 1974. SAF mailed nearly 20 million solicitations, handing out at least 120,000 "membership cards" to its contributors. The Articles and Bylaws of SAF do not state that there are no members. "Members" are referred to in the Articles as not being able to share in the distribution and shall not share in its earnings. No limitations on the members' rights are contained in the Articles or Bylaws of SAF. SAF claims more than "400,000 members and supporters" [FF 75, EX 71].

Six of the plaintiffs constituted SAF's staff. They developed and carried out SAF projects. Three plaintiffs were contributors and members of SAF.

In May 1982, Gottlieb, SAF and the Citizens Committee purchased a Bellevue building now known as "Liberty Park" for $760,000 [stipulated at 1 RP 27:11-28:81. While the Gottliebs only put $19,509 down, SAF [FF 13.29] and the Citizens Committee put down $215,253.03 [FF 13.31]. The assets of the parties were used as security for the notes [EX 53 & 54]. In November 1982, Gottlieb had SAF and Citizens Committee quit claim the building to Gottlieb and the Gottlieb executed a quit claim deed in the land to the two nonprofit organizations (EX 50,85,86; stipulated to at 1 RP 28:22-31:21. SAF and the Citizens Committee granted Gottlieb a 31-year ground lease, without any rent

escalator, fixed at $400 per month for an annual return of 1.82%.

In 1984, Alan Gottlieb was charged with felony perjury on tax-related matters. Gottlieb pled guilty to perjury and was sentenced to one year and one day in federal prison. While in prison Gottlieb conducted some SAF and citizens Committee business.

Sometime in August 1984, Mrs. Gottlieb requested computer passwords and building security system master codes. Mr. McDonald refused. From prison, Alan Gottlieb then asked him resign. Upon counsel's directions, McDonald and the entire staff of SAF began photocopying and securing records of SAF. Gottlieb learned of this, fired McDonald and appointed Michael Kenyon as acting director. The other staff members were instructed to "leave immediately" or "not bother coming back." [12 RP 50:25-51:20; 142:14-143:11; 14 RP 161:13-17]. The staff didn't leave immediately and were of the opinion that they had been fired by Kenyon[3] and the reason for the firing was because their finding out about the self dealing or Gottlieb and his use of SAF funds for his personal benefit and his having relatives on the payroll.

A complaint was brought by the former employees against SAF and then by members of SAF for breach of fiduciary duty, primarily against Gottlieb for the Liberty

---

3. Michael Kenyon's order to the staff to leave "or not bother coming back" is undisputed. The respondents' statement of the case recites virtually the same facts: "Three times he asked them to leave, the last time adding that if they did not, they need not bother to return. They did not leave. The police were called.. ." Brief of Respondents/Cross-Appellants at 21.

Park transaction, seeking various relief and alleging misconduct and self-dealing on Gottlieb's part.

A motion for a receiver was made. After an eight-day hearing on this motion, Judge Robert Winsor found that the employees "were fired by Mr. Gottlieb, Foundation President, on August 31, 1984." [Memorandum Opinion of Judge Winsor, CP 128/__ at 1:25] Judge Winsor was quite concerned about the self dealing in the Liberty Park transaction but he did not appoint a receiver. (See opinion attached to Appellant's Brief as App. F.) Judge Frank Howard was pre-assigned the case. Due to financial difficulties, plaintiffs did discovery and pre-trial matters pro se.

A Second Amended Complaint was filed over the objection of McDonald/SAVE SAF on the grounds that the Second Amended Complaint contain no allegation of specific utterances, but instead general allegations of defamation [CP 371/__; CP 40/2]. On September 24, 1985, just 20 days before trial, McDonald/SAVE SAF brought a motion for summary judgment on the grounds, among other things, that

Gottlieb/SAF failed to allege specific acts of defamation.

The Memorandum in Opposition cited 3 utterances as examples [CP 466.5/1677]. The defamation plaintiffs failed to show with convincing clarity the substantial falsity of these utterances, the malice as to each of the defamation defendants, the non-privilege of the communication, and the actual damages to SAF or Gottlieb. Nevertheless, Judge Howard denied the motion for summary judgment and allowed the case to go to trial with just a general allegation of defamation [CP 459/1556]. Thus, the defamation trial was left wide open on the defamation claims allowing any and all of the

voluminous publications of the UP IN ARMS! newsletters. There were more than 450 exhibits.

The court found for the defendants on the plaintiffs' claims and found that the plaintiffs had defamed Gottlieb/SAF by publicizing on numerous instances "more extensively and necessary than was necessary" [FF 681. The instances of defamation specifically found were those regarding "a Florida Secretary of State investigation and their termination." [FF 55 & 60] In addition, the trial court cited other "examples" of defamatory acts:

> A. The reference to"chicken thief, rape and plunder"
>
> B. Their request for investigation by the various State Attorneys General;
>
> C. Reporting on the investigations when the plaintiffs themselves were the persons 1 who requested the investigation;
>
> D. Inaccurate reporting of the Florida situation with knowledge of the true situation;
>
> E. The mailing of the Alcatraz postcards;
>
> F. The treatment of the Trustees, concerning the filing of the RICO action and publishing this in the areas of the trustee's residences.

[FF 70] The Court awarded $25,000 damages in favor of Gottlieb and $5,000 damages to SAF. Injunctive relief was granted to SAF and Gottlieb that is not material to this petition for review. [CL 22, 25][4]

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4. The appellants filed a timely notice of appeal and assigned errors to the findings described in the Judge's findings and appealed from the denial of the motion of summary judgment. The

The Court of Appeals affirmed the trial court's decision in all respects, essentially using a "substantial evidence test" for the trial court's findings on all questions including defamation and writing out of the trial court's findings concerning clearly protected speech. [App. at pp. A-7, A-10]

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED.

A. The Court of Appeals decision involves significant Constitutional questions under Article 1, Section 5 of The Washington State Constitution and The First Amendment to The United States Constitution and is in contravention of First Amendment decisions of this Court and the U.S. Supreme Court and involves issues of public import.

1. *Court of Appeals failed to conduct an independent examination of defamation evidence.* Alan Gottlieb and SAF were found to be public figures. Gottlieb was found to be the dominant force in five non-profit corporations advocating the right to bear firearms. These findings were not challenged. In order to comply with federal constitutional law, an appellate court, in reviewing a defamation case involving a public figure, must perform a de novo review, exercising independent judgment to determine whether a trier of fact establishes with convincing clarity that all four elements have been proven in order to strip the utterances of First Amendment protection. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466

(Continued)

respondents cross-appealed.

U.S. 485 (1984); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

In this case, the lower appellate court failed to make such a review; instead, adopting the general rules for reviewing the trial court's findings--the substantial evidence test -- the lower appellate court approved the trial court's findings of defamatory utterances:

> The court further found that the publication of many other statements was a result of reckless disregard as to whether the statements were false or misleading. These findings and conclusions made by the trial court with respect to the abuse of the qualified privilege, and the conclusion as to actual malice, are supported by substantial evidence.6 (footnote omitted)

McDonald v. Gottlieb, (Div. I., January 17, 1989) at A-10.

In *Bose Corp., supra*, the trial court found that Consumers Union had with actual "malice" falsely reported that Bose speakers caused instruments to wander around the room when in fact their tests showed the instruments would wander only between the speakers along the wall. *Bose Corp.* at 490. Rejecting a more lax standard of review for federal court decisions, the Court followed the rule they had imposed on state appellate courts in *New York Times v. Sullivan, supra*, at 284-86. *Bose Corp.* at 499. The Court summarized the standard for review in First Amendment cases in state courts up until *Bose Corp*:

> The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty -- and thus a good unto itself -- but also is essential to the common quest for truth and the vitality of society as a

> whole. Under our Constitution, 'There is no such thing as a false idea'... Nevertheless, there are categories of communication and certain special utterances to which the majestic protection of The First Amendment does not extend...
>
> * * *
>
> Libelous speech has been held to constitute one such category.. .In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category. Bose Corp., at 503 504. (citations omitted)

The Court then reiterated the standard set forth in *New York Times v. Sullivan, supra*, that the question of whether the evidence is of convincing clarity is not just a question for the trier of fact to determine, but is also a question for the appellate courts which must re-examine all of the records de novo:

> The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges - and particularly Members of this Court - must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amend-

> ment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Bose Corp. at 5I0-5II.

Most recently, in reversing the denial of a motion for summary judgment, *Margoles v. Hubbart*, 111 Wn.2d 195 (1988), this court held that statements in newspaper articles, in order to be found to be defamatory, must be "so inherently improbable that only 1a reckless man would have put then in circulation." *Margoles* at 205. *Accord, Mark v. Seattle Times*, 96 Wn.2d 473, 485-86 (1981). Clearly, this mandate was not followed by the Court of Appeals here. Contrary to the teachings of this Court in *Margoles* and also in *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162 (1987), the appellate court didn't even examine a number of the utterances found to be defamatory by the trial court.[5]

2. *Independent examination would reverse defamation.* If de novo review was made by this Court, then this Court would conclude that:

(a) The falsity of the reporting of the Florida State investigation by the Secretary of State when the investigation was by the Attorney General was not

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5. This is a far cry from the standard set forth by the Court of Appeals which initially pays lip service to some of this Court's opinions, but then uses a Restatement of Torts analysis without distinguishing between private defamation action defenses and public figure and/or media defenses. Decision at 7-8.

"material" since the "sting" was true: a Florida state agency was investigating Gottlieb and SAF. *Margoles, supra* at 203. *Mark v., Seattle Times, supra* at 496.

(b) The *Up in Arms* publication that metaphorically refers to Gottlieb as a "chicken thief" who "raped and plundered" SAF for his own personal gain is protected opinion. Such references are no different from the speech that was protected in *Bering v. Share*, 106 Wn.2d 212 (1986) where this court upheld the right of antiabortionists to use the words "killer", "murderer" in referring to doctors who performed abortions, Bering at 237; Accord, *Hustler Magazine v. Falwell*, __ U.S.__, 108 S.Ct. 876, 99 L.Ed 2d 41 (1988) (Falwell characterized as engaged in drunken incestuous conduct). Indeed, it is similar speech to the protection afforded to the Newport Miner reporter who charged that the Port Manager has "misappropriated" funds even though the Port Manager had been exonerated and even though the reporter had said he was going to "get" the Port Manager. *Margoles v. Hubbart, supra.*

(c) The newspaper articles referring to the plaintiff-employees as being fired is protected speech under this Court's recent and past decisions since a review of the record shows that the employees were told "not to bother to come back."[6] Under the *Margoles* standard, this evidence shows that the reporters had a basis of fact for their opinion and so the proof of actual malice is not of convincing clarity and the finding must be reversed on that ground alone. In addition, the publication of these opinions that they were fired is protected speech because no "malice" has been proven by clear, cogent

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6. Judge Winsor, after an eight-day trial referred to them as the "fired" employess. SAF's counsel also referred to former employee plaintiffs as "fired" employees.

and convincing evidence. Revenge and ill will are not sufficient to *Margoles, supra* at 207.

Finally, upon a careful review of the records, this Court will also conclude that their statements as to whether the phrase "don't bother to come back" meant they were fired and their opinions as to why they were fired are opinions that are absolutely protected under The First Amendment. *E.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 329 (1974); *accord, Bose Corp.* at 503.

3. *Lower Court's failure to overturn defamation findings for clearly protected Speech wholly improper.* The lower appellate court did not even mention Par 2(b) of this section in their opinion. In addition, they failed to review, except in passing, the other findings of defamation relating to the plaintiffs' requests for investigation of attorneys general, reporting of those investigations and the publishing of RICO actions in the trustees home town. By failing to analyze this defamation finding to determine if there was clear and convincing evidence, the lower appellate court did not meet even a rudimentary test let alone the analysis required by this Court and the U.S. Supreme Court in First Amendment cases, *e.g., Bose Corp., supra*; see *Margoles, supra.* Ignoring erroneous findings is wholly improper.

4. *Summary Judgment denial should be reversed.* In direct conflict with *Margoles,* the lower appellate court refused to pass on the trial court's denial of a summary judgment relying upon its misinterpretation of RAP 2.2 in *Johnson v. Rothstein*, 32 Wn.App. 303 (1988). Professor Tegland asserts that RAP 2.4 controls what orders are appealable and that *Johnson v. Rothstein, supra* completely misinterprets the import of RAP 2.2 which he contends is simply a listing of some order that may be appealed when entered. See 18 *Tegland's Litigation Today* at 8-9.

Whether or not Tegland is right in general, in First Amendment cases, the federal constitutional and state con- stitutional law requires an appellate review of such a decision, especially where, as here, the issue is a legal one not related to the evidence: must a public figure defamation plaintiff allege specific acts of defamation in its complaint or is it allowed to make a general allegation of defamation? To do otherwise would allow defamation plaintiffs to circumvent, through the use of sympathetic trial judges, this court's stringent requirements first set forth in *Mark v. Seattle Times, supra* and reconfirmed in *Margoles v. Hubbart, supra,* which overturned a denial of summary judgment.

5. *Damages must be set aside for defamation claims.* Since the damages award was based on finding defamation in constitutionally protected speech, and on evidence that did not meet the onerous burden required in public figure cases, the damage award must be set aside.

B. The issue of the right of members of SAF to vote is a matter of substantial public interest. The Court should void the Liberty Park transaction.

1. *Gottlieb's fiduciary duty to members of SAF.* The recent disclosure of the misappropriation of funds by PTL founder Jimmy Baker underscores the need to ensure that members of nonprofit organizations be held accountable to their members. In the days of mass media and mass mailings, there is need to place a high standard of dominant figures who control nonprofit organizations. This Court should require the head of a nonprofit organization that solicits money from its members a high degree of loyalty and impose onto that leader a high level of fiduciary duty, akin to the trustee's duty to trust beneficiaries. Under trust doctrine, any

transaction wherein the trustee transfers property to himself from the trust, the transaction is voidable at the behest of the beneficiary. *Scott on Trust*, § 170 (4th Ed. 1987) (and cases cited).

SAF has solicited members and given out membership cards. The Articles of Incorporation expressly refer to "members." The right to vote was not taken away from them. As a matter of law, the members should be considered the beneficiaries and should be entitled to vote on whether Gottlieb should receive the office building after having put down only $19, 509 while SAF and Citizens Committee paid cash of $255,253, but received only $400 per month for ground lease payment (a 1.8% annual return). See *Scott on Trust*, § 170.1, *supra*; See also, *e.g., Davoue v. Fanning,* 2 Johns.Ch. 252 (N.Y. 1816) (leading case setting aside sale of trust property to trustee personally even where fair price obtained).

2. *Members should have automatic right to vote unless full disclosure of their non-voting rights.* Giving members an automatic right to vote in nonprofit organizations unless they are specifically told in the solicitation that they have no right to vote would prevent people from being duped by mass mailing solicitations. This case gives the Court the opportunity to adopt such a rule in order to protect the public from unscrupulous "non profit" companies. Democracy in Foundations is just a salutary as it is in government. For a discussion of the factual and statutory grounds for granting SAF members a right to vote, see Appellants Brief at 22-30.

VI. CONCLUSION

The appellants request that this Court grant discretionary review and reverse the defamation claims, and

grant summary judgment on appellants ' motion for summary judgment on the defamation claims, order that Gottlieb transfer back to SAF and Citizens Committee the Liberty Park building, grant SAF members voting rights as to Board membership and other matters of importance to the membership.

DATE: March 30, 1989

Respectfully submitted,

/s/ Robert T. Czeisler
Robert T. Czeisler
Attorney for Appellants

Appendix C
Order Denying Review

The Supreme Court
State of Washington

June 6, 1989

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Re: Supreme Court No. 56055-2 - Gregory R. McDonald, et al. v. The Second Amendment Foundation, et al.
Court of Appeals No. 19422-4-I

Counsel:

The above entitled petition for review was considered by the Court on its June 6, 1989, petition for review calendar.

The petition was denied by order number 191/103 filed on June 6, 1989.

Sincerely,

/s/ C.J. Merritt

C.J. MERRITT
Supreme Court Clerk

AJE:csd

Appendix D
Findings of Fact and Conclusions of Law

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

GREGORY R. McDONALD; WILLIAM L. GARRISON, JR.; SAMUEL J. BASSO; COLLEEN McDANELD; SANDRA S. BAXTER; and DOUGLAS J. ZIMMER, Plaintiffs, v. THE SECOND AMENDMENT FOUNDATION, a Washington nonprofit corporation; ALAN M. GOTTLIEB; JEFFREY D. KANE; JOHN M. SNYDER; WILLIS HOBART; and SAM SLOM, Defendants.	NO. 84-2-12625-6 84-2-12934-4 FINDINGS OF FACT AND CONCLUSIONS OF LAW
THE SECOND AMENDMENT FOUNDATION, a Washington nonprofit corporation; and ALAN M. GOTTLIEB, Plaintiffs, v. GREGORY R. McDONALD; WILLIAM L. GARRISON, JR.; SAMUEL J. BASSO; COLLEEN McDANELD; SANDRA S. BAXTER and JOHN DOE BAXTER, her husband and the marital community composed thereof;	

and DOUGLAS J. ZIMMER and JANE DOE ZIMMER, and the marital community composed thereof,

Defendants.

THIS MATTER having come on regularly before the undersigned Judge of the above-entitled Court for trial commencing October 28, 1985. The plaintiff Gregory R. McDonald, et al. having been represented by Russell A. Austin, Jr., and John P. Payseno, Kargianis & Austin; The Second Amendment Foundation, and its Trustees, being represented by Carl J. Carlson and Lawrence E. Hard, LeSourd & Patten; and Alan Gottlieb, being represented by Jan Essenburg, Essenburg & Staton.

The parties, at this Court's direction, refined the descriptions of their claims, and identified for the court, by letter, prior to trial, a summary of their claims. These letters supplanted the Complaints in this case. The claims of Mr. McDonald, and the other plaintiffs, in Cause No. 84-2-12625-6 were set forth in a letter dated August 15, 1985; the claims of Alan Gottlieb were contained in letters dated June 25, July 17, and August 15, 1985; the claims of The Second Amendment Foundation were set forth in a letter dated June 24, 1985.

The Court having heard the evidence, received and considered the exhibits, having heard and considered the briefs and arguments of counsel and being in all matters and things fully advised, does now make the following findings of fact. (Headings are used only for purposes of organization, and do not limit the issues with respect to which findings may apply.)

FINDINGS OF FACT

1. The Second Amendment Foundation (hereinafter "SAF") is a Washington nonprofit corporation. Its purpose, according to its Articles and the public statements made, is to promote and protect the rights of gun owners, and to educate the public in this respect.

2. The main source of income to SAF is the solicitation of contributions. In some years those contributions have exceeded 2.5 million dollars.

3. There is a significant relationship between SAF, the Center for the Defense of Free Enterprise, and the Citizens Committee for the Right to Keep and Bear Arms ("the Committee", "the Citizen's Committee", or "CCRKBA", below), as to their purpose and objectives, their personnel, and their governing board of trustees. All of the aforementioned organizations depend on solicitation of funds as their source of income.

4. There has been a year when the contributions to SAF and the Citizens Committee, if taken together, exceeded 5 million dollars.

5. At all times material hereto, Alan Gottlieb has been a dominant and active figure in all three organizations noted above, and with regard to SAF, he has had a significant voice and control in establishing policy.

6. Gregory R. McDonald was SAF's Executive Director from October, 1981 through August 31, 1984.

7. William L. Garrison, Samuel J. Basso, Colleen McDaneld, Sandra Baxter and Douglas Zimmer were SAF employees, working under Mr. McDonald, as of August 31, 1984. These individuals, along with Mr. McDonald and Messrs. Glenn Richard Anderson and D.

Bruce Moriarity, will sometimes be referred to collectively as "plaintiffs" below, unless specified otherwise.

8. Glenn Richard Anderson and D. Bruce Moriarity were contributors to SAF. Mr. Anderson's first contribution was made on October 18, 1983, and his last on June 8, 1985; Mr. Moriarity's first contribution was on September 20, 1983, and his last on August 26, 1984.

9. Jeffrey D. Kane, John Snyder and Willis Hobart have been Trustees of SAF since its incorporation; Sam Slom has been a Trustee since November 7, 1982.

10. Plaintiffs engaged in extensive pretrial discovery. They were represented by able counsel, and were able to prosecute this action effectively.

11. The employee plaintiffs (McDonald, Basso, Baxter, Garrison Zimmer and McDonald) had access to substantial information regarding SAF's affairs while they were employed. Greg McDonald, as Executive Director, had access to and reviewed SAF financial transactions, made annual reports and presented proposed annual budgets to the Board of Trustees, worked with Mr. Gottlieb in preparing the text and contents of SAF fundraising mailings, and was generally responsible for overseeing and executing SAF programs and operations.

12. The suit is brought by former employees and persons claiming membership in The Second Amendment Foundation against Alan Gottlieb and the trustees of the Foundation.

13. The following evidentiary facts were prepared by plaintiffs and stipulated to prior to commencement of trial. The bracketed following material constitutes other facts, but not all of them, proven at trial and relevant to

the subject matter areas addressed by the stipulated evidentiary facts. The stipulated facts are subject to verification or correction when, and if, the record is transcribed.

13.1 In September, 1983, Mr. Gottlieb attended a function at Hot Springs, Virginia. Mrs. Gottlieb accompanied Mr. Gottlieb at Foundation expense.

13.2 The Foundation expended $848 in air fare for Mrs. Gottlieb to accompany her husband during a trip in November, 1983.

13.3 In January, 1984, Mrs. Gottlieb accompanied her husband to Phoenix, Arizona at a cost to the Foundation of $276.50.

13.4 Upon Mr. Gottlieb's incarceration in Spokane, Mrs. Gottlieb flew to see him on June 22, 1984. The Foundation paid for her air fare in the amount of $120.

13.5 Around July 18, 1984, the Foundation paid for a trip for Mrs. Gottlieb to Spokane for $120.

13.6 Mr. Gottlieb's brother-in-law, John Versnel, flew to Spokane at Foundation expense of $101.43.

13.7 Commencing in mid-June, 1984, through October, 1984, the Foundation paid Alan Gottlieb a monthly salary of $2,000 per month, for a total of $8,000, while he was incarcerated in Spokane.

13.8 John Snyder is a member of the Board of Trustees and the treasurer of the Foundation. He was paid bonuses and salary by the Foundation from January, 1982 through July, 1985, which, over the course of 3 1/2 years, totalled $21,600.

13.9 Julia Ransdell is the mother-in-law of Alan M. Gottlieb. She was paid the sum of $11,558 by the Foundation from October, 1982, until May, 1984.

13.10 Linda Tomizek was Alan Gottlieb's secretary. Through August 5, 1984, she received one-half of her salary from SAF and one-half from the Citizens Committee for the Right to Keep and Bear Arms. Between January, 1982, and August, 1984, she received $16,200 from SAF.

13.11 Between March, 1983, and September, 1983, Steve Sego was paid $9,000 in salary by the Foundation.

13.12 Suzanne Lewis is a bookkeeper. Between March, 1981, and March, 1984, she was paid $31,700 by the Foundation.

13.13 Between January, 1981, and June, 1981, Reina Telfer was paid $4,909 by the Foundation.

13.14 Floyd Brown, between July, 1982, and March, 1983, was paid $936.40 by the Foundation.

13.15 The Foundation was, until May, 1982, located at Bellefield Office Park in Bellevue, Washington. [The Foundation's lease expired at the end of April, 1982, and there was a possibility of a rent increase at Bellefield thereafter.]

[In November, 1981, the Foundation's and the Committee's Boards of Trustees directed Alan Gottlieb to look for a building the organizations could purchase to serve as the organizations' headquarters, to obtain a long-term, stable location for the organizations and to avoid expected rent increases.]

[Alan Gottlieb first attempted to interest the Foundation's high dollar donors in contributing toward or becoming involved in the purchase of such an office building, but there was no positive response from those contacted.]

[In January and February of 1982, Alan Gottlieb, and Greg McDonald on one occasion, looked at a number of potentially suitable office buildings but the buildings were not exactly what they felt the organizations neeeded and neither SAF nor the Committee was able to obtain seller or bank financing to purchase any of them.]

[In late February, 1982, a parcel of land and a building under construction was discovered. The land and building were then owned by the Buchan Brothers Construction Company. It was well suited to the needs of SAF and the Committee, and Greg McDonald and the SAF staff were in favor of purchasing the parcel and building if possible.]

13.16 On March 7, 1982, the Foundation, the Citizens Committee for the Right to Keep and Bear Arms, and Alan and Julie Versnel Gottlieb, leased the land and building now known as Liberty Park located at 12500 N.E. lOth Place in Bellevue, Washington, from the Buchan Brothers Construction Company.

13.17 SAF, the Committee, and the Gottliebs also had the right to purchase Liberty Park, pursuant to a Real Estate Purchase and Sale Agreement dated March 7, 1982, for $760,000. [The purpose of executing this document was to fix the purchase price for Liberty Park and to give the organizations time to obtain financing. At the time, the Committee deposited $16,333 with the Buchan Brothers constituting the first and last months' rent under the lease, which amount, less any rent payments due between lease commencement and closing,

was to be applied to the purchase price of Liberty Park if the sale was closed according to the terms of the Real Estate Purchase and Sale Agreement with the Buchan Brothers.

13.18 The Buchan Brothers lease was effective May 1, 1982, and provided that the lessees would pay an initial monthly rental of $8,166.67, with annual rent escalators, for a period of five (5) years thereafter. The lease provided a base portion of the custodial services, electricity, water and sewer were provided the tenants as part of the rental price. [Such service: in excess of the base were to be paid by the tenants. The Buchan Brothers lease, including the rental amount, was negotiated with the Buchan Brothers at arms length.]

13.19 [The Buchan Brothers had previously obtained a $363,000 commitment from SIMCO to take out the construction financing provided them by Seattle Trust. In March, 1982, the Buchans suggested to Alan Gottlieb that the organizations pursue financing for the purchase of Liberty Park with SIMCO.]

[Discussions with SIMCO resulted in the assignment of the Buchan Brothers' $363,000 loan commitment to Alan Gottlieb and Julie Versnel Gottlieb on April 29, 1982. SIMCO would assign the commitment to the Gottliebs and the organizations, but SIMCO representative Mr. DeDonato would not have recommended that it be assigned to the two organizations alone. In addition:

(1) By SIMCO requirements, the loan had to close before June 15, 1982, or the commitment funds would be lost.

(2) SIMCO could not increase the amount of the loan, so the Buchan Brothers had to seller finance $247,000 of the Liberty Park purchase price. The

Buchans wanted the balance of the purchase price over and above $510,000 paid in cash.

(3) SIMCO required the payment of an additional loan fee because of its increased risk from the assignment of the commitment. The Gottliebs personally paid this increased loan fee in the amount of $10,890.

(4) SIMCO refused to restructure the transaction other than to make the assignment of the Buchan Brothers' loan commitment to the Gottliebs.

(5) SIMCO required seven year leases to be executed on the Liberty Park building.]

13.20 On April 27, 1982, Alan M. Gottlieb acting as lessor signed a commercial premises lease with SAF as lessee. At this point the building was still owned by the Buchans. The effective date of the lease was May 1, 1982, and was for a term of 7 years.

13.21 The Citizen's Committee for the Right to Keep and Bear Arms entered into an identical lease with the Gottliebs for space in the Liberty Park building. The total of the monthly lease payments for SAF and the Committee, $8,166.00, was virtually identical to that paid under the Buchan lease. [The building leases between SAF and the Committee and the Gottliebs omitted any rent escalator clause, although the organizations paid for some services that would have been provided as part of the rent under the Buchan lease.]

13.22 On May 13, 1982, SAF and the Citizens Committee each issued checks to Alan M. and Julie Gottlieb, d/b/a "Liberty Park" for $8,166. These payments constituted the respective organization's June, 1982, rent payment and the last month's rental deposit.

13.23 [On May 21, 1982, the SAF Board, pursuant to telephon conferences among the members, by Resolution authorized Greg McDonald as Executive Director of SAF, and Alan Gottlieb as its President, to execute the documents necessary to obtain permanent financing with SIMCO for SAF to jointly purchase Liberty Park with the Committee and the Gottliebs, including a note, deed of trust, assigrunent of rents and leases, and such other documents as the lender may require. Alan Gottlieb did not participate in the Board vote on its Resolution.]

13.24 On May 26, 1982, a deed of trust note in the amount of $363,000 was entered into between SIMCO and the Foundation, the Citizens Committee, and the Gottliebs. The monthly payments on this note were for $4,726.56. In addition, there were requirements for tax and insurance reserves. The term of the note was five years, with the balance due as a balloon payment plus accrued interest on July 1, 1987. The interest rate was 15.625% per annum.

13.25 On May 26, 1982, a "Deed of Trust" was also entered into between SIMCO (the beneficiary) and the Gottliebs, the Foundation and the Citizens Committee (grantors) and Chicago Title Insurance (trustee). By this deed of trust, the Liberty Park land and building and all personal property of the Gottliebs, the Foundation, and the Committee located on the Liberty Park premises was security for the SIMCO Deed of Trust Note. In addition, an assignment of lease and rents to SIMCO was entered into. [At the request of Alan Gottlieb, the SIMCO Deed of Trust Note was a limited recourse note as to SAF and the Committee as shown by the terms of Exhibits 53 and 54.]

13.26 [On June 1, 1982, the joint purchase of Liberty Park by SAF, the Committee, and the Gottliebs

closed with SIMCO and the Buchan Brothers. The Gottliebs participated in the transaction because SAF and the Committee did not have sufficient credit to obtain financing for the purchase on their own.]

13.27 On June 1, 1982, as part of the closing, a "Deed of Trust" was also entered into between Buchan Brothers Construction Company (beneficiary) and the Gottliebs, the Foundation and the Citizens cbmmittee (grantors), and Chicago Title Insurance Company (Trustee). This deed of trust was subordinated to the SIMCO deed of trust and note and also covered the Liberty Park building and real estate.

13.28 On June 1, 1982, Alan M. and Julie Versnel Gottlieb also signed a "monthly installment note" as borrowers with Buchan Brothers Construction Company (lender). The note was valued at $147,000, and provided for monthly payment of $2,012.55, with the balance due on June 1, 1987, in a balloon payment plus accrued interest. The Buchan Brothers note bore interest at 16.25%. [In the summer of 1983, the Gottliebs personally refinanced the entire balance of the Buchan Brothers' note and obtained the release of the Liberty Park land and buildings as security under the Buchan Brothers deed of trust. Liberty Park was not used as security for the refinance.]

13.29 The Citizens Committee had earlier made a $16,333 payment on the first and last months rent due under the Buchan Brothers' lease, of which the balance remaining after deducting rental due was to be applied as an earnest money payment on the transaction to purchase Liberty Park if that occurred. On June 1, the Foundation paid $82,626.51 to Shelter Escrow as part of the "down payment" for the purchase of Liberty Park. The Citizens Committee paid $66,293.52 for the same.

Alan M. and Julie Versnel Gottlieb paid a total of $19,509.87 which included the $10,890 the Gottliebs paid to SIMCO for the increased loan fees.

13.30 In addition, on June 1, 1982, the Foundation paid Buchan Brothers Construction $25,000 by check. The Citizens Committee made an identical payment. This joint payment constituted the first payment on the joint $100,000 note [the two organizations executed to the Buchan Brothers. The combined $50,000 payment from SAF and the Committee was made at closing, rather than according to the terms of the $100,000 note to the Buchan Brothers, because of agreements previously reached between the Gottliebs and the Buchan Brothers reflected in the Second Amendment (Exhibit 164) and the Supplemental Agreement (Exhibit 216) in order to buy more time for the organizations to obtain financing to purchase Liberty Park on their own.

13.31 Total cost to the Foundation at closing was $107,626.51, in cash. The total cost to the Citizens Committee was $107,626.52, in cash, including the $16,333 it earlier paid on the Buchan Brothers lease.

13.32 [By telephone conference on June 24, 1982, the SAF Board of Trustees met and unanimously voted, without Alan Gottlieb's participation in the vote, among other things: to reaffirm the May 21, 1982, resolution to authorize the joint purchase of Liberty Park by SAF, the Committee, and the Gottliebs'; to reaffirm their prior oral agreement, before the joint purchase of Liberty Park on June 1, 1982, that the land and buildings of Liberty Park would be partitioned with the land being owned by SAF and the Committee and the buildings being owned by the Gottliebs'; to affirm that the purchase, the partition, and the reciprocal leases would be

advantageous to SAF and in its best interests, and that the Gottliebs'participation enabled SAF and the Committee to purchase Liberty Park under circumstances where the two nonprofit organizations could not have purchased it on their own; and to direct Greg McDonald and Alan Gottlieb to execute the documents necessary to effect the partition and the reciprocal leases.]

13.33 On November 7, 1982, the boards for both SAF and the Committee met in Seattle in part to review the Liberty Park transaction. [There was then discussion among board members regarding aspects of the Liberty Park transaction and Greg McDonald and Alan Gottlieb were present during such discussion and answered questions from both SAF and Committee board members. The boards for both SAF and the Committee voted to ratify the Liberty Park transaction, Alan Gottlieb abstaining, and the parties then executed the Partition Agreement, the Reaffirmation of Leases, the Ground Lease, and the reciprocal quit claim deeds.]

13.34 In the Partition Agreement, the value assigned to the land was $250,000. The value assigned to the building was $510,000.

13.35 On November 7, 1982, the Foundation and the Citizens Committee each signed separate "Reaffirmation of Lease" agreements with the Gottliebs. This legal document was drafted and prepared by the law firm of LeSourd & Patten.

13.36 On November 7, 1982, Alan M. and Julie Gottlieb signed a "Ground Lease" for the Foundation and the Citizens Committee for the Right to Keep and Bear Arms. The term of the ground lease was for 7 years and the ground lease provides for 4 additional option terms of 6 years each. The total term of the ground lease was not to exceed 31 years. The lease pro-

vided that the Gottliebs pay the two nonprofit organizations $400 per month ($200 each) for the term of the lease. There is no escalator clause for rent increases.

13.37 On November 30, 1982, the Foundation and the Citizens Committee for the Right to Keep and Bear Arms made the final payments on the $50,000 balance due on the Buchan $100,000 note. Each organization paid $26,500, which included interest accrued.

13.38 Between January 28, 1981, and July 17, 1984, SAF paid $9,563 to M. Arnot, Inc., for programming the IBM computer.

13.39 Between December 17, 1980, and September 30, 1983, SAF paid the law firm of LeSourd & Patten the sum of $10,279.84, in connection with the lawsuit entitled *United States of America v. Gottlieb.*

14. In the years 1982 and 1983, Alan Gottlieb received $70,000 and $69,000, respectively, in total salary and bonuses from SAF and the Citizens Committee, combined.

15. The Board of Trustees of SAF generally meet once a year. There has been relatively little turnover in board members since the organization was founded in 1974.

Dismissal at Conclusion of Plaintiffs' Case

At the conclusion of the plaintiffs' case, this Court weighed the evidence and made a factual determination that the plaintiffs had failed to establish by a prima facie case by credible evidence, or that the credible evidence established facts which precluded the plaintiffs' recovery, on many of their claims. Findings of Fact 16 through 37, below, address the issues determined at the conclusion of the plaintiffs' case.

16. To the extent SAF paid for Julie Versnel Gottlieb's travel expenses, such travel was reasonably related to SAF business.

17. The $101.43 paid by SAF for travel by John Versnel was for travel at SAF's request, conveying SAF documents, to meet certain demands of Mr. McDonald.

18. During the time SAF paid Mr. Gottlieb $2,000 per month while he was incarcerated, Mr. Gottlieb continued to perform work for SAF. Whether the value of his work, and his value to the corporation upon his release, were sufficient to justify the salary are decisions properly made by the corporation.

19. Plaintiffs failed to provide any credible evidence that Mr. Gottlieb's private companies utilized SAF office or data processing equipment without providing fair compensation.

20. Mr. Gottlieb had a personal ownership interest in three private companies which provided goods or services to SAF (as well as CCRKBA and CDFE). Those three companies were Royal Printers (a printing company), Merril Mail Marketing (a mail processing company), and Merril Associates (list brokering and consulting).

21. Mr. Gottlieb presently has, or had in the past, an ownership interest in Merril Mail Marketing, Merril Associates and, Royal Printing. In the past, these organizations have done substantial business with SAF.

22. SAF's ongoing business dealings with private companies in which Mr. Gottlieb had an owmership interest were disclosed to and approved by the Board of Trustees, and were disclosed annually in the Foundation's audit and tax return prepared by Coopers &

Lybrand. Those audits were made available to Mr. McDonald, the Board of Directors and, on request, to persons asking to see a copy.

23. SAF periodically obtained competitive bids sufficient to ensure that the prices charged by Gottlieb's companies were fair. The printing, mailing, and list brokering/consulting services were provided by Mr. Gottlieb's companies at, or generally below, the general market price and the quality of goods and services were equivalent to market quality for comparable goods.

24. Mr. Gottlieb did not force SAF to do all of its business with his private companies. A portion of SAF printing and mailing work was sent to competing printing and mailing companies.

25. Plaintiffs failed to provide any credible evidence that Mr. Gottlieb ignored the recommendations of accountants to establish internal controls on finances, in order to permit him to invoice SAE for, or receive payment for, goods or work not delivered.

26. Plaintiffs failed to provide any credible evidence that Mr. Gottlieb's private companies invoiced SAF, or receive payments from SAF, for work and goods not provided.

27. SAF did not give preferential treatment in the payment of bills to companies in which Mr. Gottlieb had an owmership interest.

28. Mr. Gottlieb's private companies did not use time on SA5's mainframe IBM computer without paying for such use.

29. Plaintiffs failed to present sufficient credible evidence to sustain their contention that SAF had

improperly transferred copies of the book *The Rights of Gun Owners* to CCRXBA, that any such transfer would violate SAF's 501(c)(3) tax status, or that the Trustees had breached any fiduciary duty with respect thereto.

30. SAF has, over the years, paid for certain educational expenses, and provided scholarships, for employees of SAF, CCRKBA, and the Service Bureau Cooperative (which provided services to SAF and CCRKBA). All such employees were working in connection with the right to keep and bear arms. These payments included payment for some of the educational expenses of non-SAF employees, including Mike Kenyon. Mr. Kenyon was employed by CCRKBA, and SAF, when he was the beneficiary of those payments.

31. Plaintiffs have failed to sustain their contention that SAF violated IRS rules in paying the educational expenses of Mr. Kenyon, or that the Trustees otherwise breached any fiduciary duty with respect to the payment of educational expenses.

32. SAF has not paid the legal bills incurred by Mr. Gottlieb's personal attorneys to represent him, personally. The $10,729.54 paid to LeSourd & Patten was for work on behalf of, and benefitting, the Foundation.

33. Plaintiffs failed to provide any credible evidence that SAF's purchase of the newspaper, *Gun Week*, constituted a waste of corporate assets, or was otherwise a breach of the Trustees' fiduciary duty.

34. Plaintiffs failed to provide any credible evidence that SAF had improperly paid for, or shared, facilities or equipment used by CCRKBA, CDFE, the Service Bureau, or Mr. Gottlieb's private companies.

35. Plaintiffs failed to provide any credible evidence in support of their claims that (a) SAF had not awarded

prizes in the "Guns that Made America Great" sweepstakes promotion, (b) SAF had engaged in deceptive fundraising, or (c) SAF had failed to fulfill its promises to life members, or other "members", or contributors, regarding what they would receive in exchange for their contributions.

36. Plaintiffs failed to sustain their claims that Messrs Gottlieb or Kenyon breached any fiduciary duty by any alleged violation of any federal rule or regulation by "switching" SAF monograph covers with covers identifying CCRKBA, in connection with a Post Office application, or that the Board of Trustees breached any fiduciary duty with respect to any such claimed events.

37. At the conclusion of plaintiffs' case, all claims against the defendants were dismissed, the Court having weighed the evidence and determined that plaintiffs had failed to sustain the burden of proof to establish them, except for the following:

A. The allegations relating to the Liberty Park real estate transaction;

B. The claimed collection and retention of royalties on the book, *The Rights of Gun Owners*;

C. The claim that individuals or family members were on the payroll but did not, in fact, perform work for SAF;

D. The claimed breach of employment contract by the plaintiff McDonald against SAF.

Resolution of Claims Upon Completion of Trial

38. Mr. Gottlieb did substantial work in preparation of the book, *The Rights of Gun Owners*. He was assisted by others, some of them while performing work for SAF. Mr. Gottlieb also expended substantial personal effort in promotion of the book through touring, public appearances and radio and television appearance.

39. SAF paid a substantial part of the expenses of the tours and media appearances promoting *The Rights of Gun Owners*. SAF received substantial benefit from the media tours.

40. Mr. Gottlieb's contracts with the publisher of *The Rights of Gun Owners* provide for him to personally receive royalties on sales of some editions of the book. Mr. Gottlieb would not have received royalties on any books purchased by SAF because of the lower price at which it was entitled to purchase the books. As of the time of trial, no such royalties had been received, and it was uncertain whether any ultimately would be generated under those contracts. Whether, under the circumstances, Mr. Gottlieb is entitled to royalties for the book is a proper discretionary decision of the Trustees, in the exercise of their business judgment.

41. It is established that family members have been paid by SAF. At certain times they did, in fact, perform work for SAF. There may have been some overlap with other corporations but this would not be unusual, considering the nature of each corporation's purpose and their manner of conducting business in the close proximity of space.

42. To the extent Gottlieb family members were on the SAF payroll, they did perform work for SAF, commensurate with the pay they received.

43. The plaintiffs have failed to establish any substantial instance where there were persons on SAF's payroll who were not performing work for SPF, or performing services which benefited SAF. This applies to the payments made by SAF to John Snyder, Linda Tomizek, Steve Sego, Sue Lewis, Reina Telfer, and Floyd Brown.

44. The alleged McDonald employment contract appears to have been based on two separate conversations between McDonald and Gottlieb. There was no firm agreement or "meeting of the minds" between the parties that McDonald would be employed until January oi 1985, by SAF. The contract, by its terms, could not be performed within a year. There is no credible evidence of agreement between Mr. McDonald and Alan Gottlieb on behalf of SAF.

45. Mr. McDonald, during May-July 1984, engaged in conduct inconsistent with his assertion that he then had a binding employment contract.

46. The purchase of the Liberty Park real estate in the manner it was acquired and structured resulted in substantial dollar benefits to the Gottliebs, by reason of the tax implications of the transaction, such as the Gottliebs' owning the depreciable buildings and the corporations owning the land.

47. There are advantages and disadvantages to the Gottlieb lease compared to the previous Buchan Brothers' lease. The weighing of those factors would appear to be the type of decision that should be made by the governing bodies of the corporation, if they were in fact independent and fully informed of the facts. Mr. and Mrs. Gottlieb assumed significant personal risks in connection with their participation in the Liberty Park transaction. The Gottliebs did not illegally profit from

that participation. All parties to the Liberty Park transaction received some benefits.

48. On this record Mr. Gottlieb, considering his domination, had the ability to make the determination to make the purchase in the form it was closed in. He essentially structured the buildings to himself and the land to the corporations. While the joint purchase was subsequently refined by the attorneys and the accountants to minimize the tax risks to the corporation's 501(c)(3) tax status, there, nonetheless, were tax risks to the corporation due to the presence of a related party in the transaction.

49. The trustees were informed of the proposal, were aware of the nature and extent of Mr. Gottlieb's involvement in the Liberty Park transaction and they formally approved the transaction. The board's decisions on all of these subjects were within their discretion and business judgment, if they were fully aware of the facts. Alan Gottlieb did not vote on any of these decisions. However, the trustees were not aware of the extent of the potential risk the transaction posed to SAF's preferred tax status, although some of them were aware that there were some risks. Mr. Gottlieb did not bring to the SAF Board's attention all of the information available on the SAF tax status issue which Mr. Gottlieb acguired after the Board initially approved the joint purchase of Liberty Park on May 21, 1982. SAF has suffered no damage as a result, and its tax-exempt status remains intact.

50. Mr. Gottlieb did not manipulate the cash assets of SAF to make early payments on a loan related to Liberty Park to personally benefit himself at the cost of several thousand dollars to SAF.

51. Mr. Gottlieb's interest in the Liberty Park transaction was disclosed to the Trustees, Gregory McDonald, and in annual audits and tax returns.

52. The SAF Board of Trustees acted reasonably, honestly and in good faith in approving the purchase of, the partition of, and lease arrangements regarding, the Liberty Park property, considering the information given to them at the time that they acted.

Defamation

53. Messrs. McDonald, Garrison, Basso and Zimmer, and Ms. Baxter and McDaneld (referred to below as the "defamation defendants"), between September, 1984 and January, 1986 published many statements about Alan Gottlieb and SAF which included (a) intentionally false statements of fact known to some defendants, (b) opinion-like statements implying the existence of underlying facts which were false, (c) statements which were false and misleading due to the omission of material facts, and (d) statements alleging criminal conduct in both opinion-like and in factual form.

54. Such statements were contained in defamation defendants' newsletters entitled "Up In Arms", in news releases and in letters to individuals, publications, organizations and governmental agencies, Exhibits 1 through 20, 301, 302, and 304. Many of the false and defamatory statements plaintiffs disseminated in these Exhibits were republished in Exhibits 21 through 38.

55. The defamation defendants also published that Mr. Gottlieb had fired the entire senior staff of SAF (1) "for questioning his illegal activities", (2) because they

"had become aware of numerous improper and possibly illegal activities concerning the handling of Foundation funds", and (3) because they had resisted various illegal and unethical activities by Mr. Gottlieb. These statements were not true. Paragraphs 56 through 59, below, set forth the true sequence of events.

56. On August 29, 1984, Mr. Gottlieb requested Mr. McDonald's resignation as Executive Director of SAF, for performance-related reasons, and also as a result of what Mr. Gottlieb perceived were insults or insubordination by McDonald directed towards Mrs. Gottlieb.

57. Mr. Gottlieb on August 31, 1984 told Mr. McDonald he was terminated as Executive Director. That same day, the Executive Committee of the SAF Board of Trustees, consisting of Mr. Gottlieb and Jeffrey Kane, conferred and voted to terminate McDonald, which action was relayed to McDonald that day by telegram.

58. Mr. McDonald has not, on or before August 31, 1984, accused Mr. Gottlieb of any illegal, improper or unethical conduct in his dealings with SAF, or any other entity. Neither had any of the other defamation defendants accused Mr. Gottlieb of any such conduct on or before that date. None of the defamation defendants "resisted" any such conduct. Mr. McDonald's termination resulted form personality conflicts and concerns over his job performance.

59. Neither Mr. Gottlieb, nor SAF, fired other SAF employees on or around August 31, 1984. Those employees who did not return to work the following work day did so because they had elected to join with Mr. McDonald in suing SAF and Mr. Gottlieb.

60. It is established by clear and convincing evidence that many of the statements were published by the defamation defendants with reckless disregard as to whether they were false of misleading, and knowing that their statements regarding a Florida Secretary of State investigation, and their termination, were false.

61. The defamation defendants did not impartially investigate many of the facts before publishing their statements about SAF and Mr. Gottlieb.

62. The false and misleading statements tended to expose Gottlieb and SAF to hatred or contempt, to deprive them of the benefit of public confidence, and to injure them in connection with their trade or business.

63. The statements were repeatedly published to a wide audience, including at various times some of SAF's best contributors (on one occasion, about 7,000 such contributors), many gun-related publications, a "VIP list" of influential gun-rights and conservative political figures and organizations, the attorneys general of all 50 states, and numerous federal and state regulatory agencies.

64. Alan Gottlieb is a public figure, as far as the gun rights movement is concerned. He became such voluntarily as a result of his public involvement and association with SAF and related organizations, and by his clear and continuous involvement with the media.

65. As a result of publication of the false and defamatory statements, both Alan Gottlieb and SAF suffered actual damages. Alan Gottlieb was injured in his reputation and suffered mental anguish and personal humiliation. SAF was injured in its reputation and suffered an actual decline in contributions.

66. Alan Gottlieb was convicted by the federal court on a plea of guilty to one count of wilfully filing a tax return, verified under penalty of perjury, without believing it to be true and correct as to every material matter, and was sentenced to one year and one day under federal custody. He did thereafter, and as a result of the conviction, served a period of time in federal custody.

67. A substantial or significant portion of the claimed defamation damage or loss would have occurred to Alan Gottlieb and to SAF as a result of publication of statements in those areas in which the plaintiffs did have a qualified privilege to fairly report.

68. It was also established by clear and convincing evidence that the defamation defendants published false statements regarding Mr. Gottlieb and SAF relating to subjects within their qualified privilege more extensively and excessively than was necessary or appropriate to achieve any legitimate purpose of providing information to persons properly interested in the affairs of SAF.

69. The defamation defendants published false and misleading statements regarding SAF and Mr. Gottlieb in order to, among other reasons, solicit funds to pursue the present action.

70. Examples of the numerous instances on which the plaintiffs abused the qualified privilege are:

A. The references to "chicken thief, rape and plunder";

B. Their requests for investigation by the various State Attorneys General;

C. Reporting on the investigations when the plaintiffs themselves were the persons who requested the investigation;

D. Inaccurate reporting of the Florida situation with knowledge of the true situation:

E. The mailing of the Alcatraz postcards;

F. The treatment of the Trustees, concerning the filing of the RICO action and publishing this in the areas of the trustees' residences.

71. The various publications by the several plaintiffs place each of them in different positions of responsibility as far as their active participation or their knowledge, or what investigation they made.

72. Mr. Gottlieb did not illegally divert contributions from SAF to his use.

73. The Trustees acted at all times honestly and in good faith.

74. SAF's Articles and Bylaws do not designate any class of classes of members, the qualifications or rights of members, or any manner for election or appointment of members. They neither give one membership rights in the Foundation, nor explicitly set forth that the Foundation has no members. SAF's incorporators did not intend SAF's Articles or Bylaws to create members with voting rights.

75. SAF, in its direct mail and telephone solicitations, often referred to persons as "members". It sent mailing to contributors containing membership cards, along with requests to contribute "voluntary dues". The parties stipulated that SAF in 1982 and subsequent years distributed over 120,000 such cards annually. The payment of dues, or the making of a contribution, was not a prerequisite to retaining the card.

76. SAF, in its fundraising solicitations, represented that contributors, or "members", would receive certain publications, mailings, discounts on merchandise, and miscellaneous other benefits such as access to a lawyer referral service; SAF did not represent nor imply that contributors, or holders of membership cards, would have any right to vote on the election of SAF Trustees, or on other corporate decisions. SAF did provide to contributors the publications, mailings, discounts; lawyer referral service, and other miscellanous services identified in its solicitations. No evidence was presented that any person contributed in reliance on any representation that the contributor would acquire voting rights with respect to corporate affairs.

77. No plaintiffs, except for Moriarity and Anderson, made any financial contribution to SAF, received any fundraising solicitations from SAF, or were contained on SAF's list of contributors. Basso and Zimmer, while they were employed by SAF, acquired a plastic SAF membership card. No representations were made to them that they thereby were entitled to any benefits or rights.

78. The defamation defendants have in their possession information derived from one or more computer print-outs of lists of contributors to The Second Amendment Foundation, which they took while they were employed by SAF.

79. SAF's list of contributors is a valuable mailing list, which constitutes confidential information having substantial economic value to SAF.

80. The defamation defendants have, since August 1984, used the information derived from the SAF contributor lists, without the consent of SAF, in contacting SAF contributors and, among other things, soliciting

contributions. They received in excess of $22,000 in response to solicitations directed to SAF contributors in this manner.

81. The name "The Second Amendment Foundation", and the initials "SAF" have, over the years, become associated with SAF, and the Foundations's work in support of the rights guaranteed by the Second Amendment to the United States Constitution. Use by others of a similar name would have a substantial tendency to confuse third parties. SAF has common law trademark and trade name rights to these designations.

82. The defamation defendants have presented themselves as an organized group styled as "Save the Second Amendment Foundation", "SAVE SAF", and the "Save SAF Committee". Using such designations, they have prepared letters and written materials, including solicitations for contributions, similar in format to letters and materials prepared by The Second Amendment Foundation itself.

83. The defamation defendants, on or around August 31, 1984 took without authorization documents and copies of documents from the offices of SAF, including but not limited to, approximately two file drawers of SAF documents and records taken on August 31.

84. Since August 31, 1984 there has been substantial ill will between the defamation defendants, on one hand, and SAF and Mr. and Mrs. Gottlieb on the other hand. Personal interaction among the two sides, or the presence of the defamation defendants on or around SAF premises, or Mr. and Mrs. Gottlieb's premises, could potentially result in tension, or disruptive events.

85. This Court entered a Preliminary Injunction on October 1, 1984, enjoining Messrs. McDonald, Garrison,

Basso and Zimmer, and Ms. Baxter and McDaneld, from engaging in certain conduct. With respect to that conduct, SAF has a clear legal right to (a) exclusive use of its contributor list; (b) exclusive use of the name "The Second Amendment Foundation", the initials "SAF", and similar designations; (c) prevent the distribution of documents and records taken without consent of its offices; (d) prevent its ex-employees from attempting to transact business for or on its behalf; (e) prevent its ex-employees from taking possession of any additional records, documents, or other property of SAF; and (f) prevent its ex-employees from improperly entering upon its premises, interfering with the work activities of its employees or staff, from contacting entities doing business with SAF for the purpose of causing them to change their relationship with SAF, from harassing SAF agents or employees, or improperly engaging in similar conduct which interferes with SAF's activities or assets.

86. SAF has a well-grounded fear of violation by the defamation defendants of the legal rights described immediately above, which violation could result in substantial injury to SAF.

87. SAF has no readily available action at law for violations of the rights set forth in paragraph 85, above, because damages therefrom would be difficult to measure, often impossible to reverse, and as a practical matter, could be well in excess of the ability of the party liable to pay.

88. The defamation defendants do not suffer any significant burden from being restrained from engaging in the conduct violating the legal rights described in paragraph 85, above, or from being required to return all contributor names and information, and other SAF records to SAF.

89. During this litigation, this Court has entered the following orders, requiring that documents produced by SAF, CCRKBA, CDFE, the Service Bureau, and Mr. Gottlieb, to the plaintiffs, and all copies thereof, shall be returned to SAF's attorneys at the conclusion of this litigation:

(a) 10/1/84 -- Checkbooks and check registers maintained by the Service Bureau from 1979 to "present";

(b) 10/1/84 -- Files related to CCRKBA Post Office Appeal;

(c) 10/1/84 -- Information contained in SAF's word processing system;

(d) 10/1/84 -- All documents subpoenaed for depositions to date;

(e) 2/8/85 -- Documents produced pursuant to Judge Winsor's Show Cause Order.

90. Counsel for SAF and the plaintiffs stipulated on October 24, 1985, that SAF would produce certain of its attorneys' files relating to Liberty Park, provided that those materials would not be used other than as necessary to prepare for this litigation, and would not be disclosed to third parties. Certain of those documents constituted privileged materials, which are not discoverable by persons other than the client which, in this case, was SAF. Exhibits 39, 40, 43, 45, 46, 47, 51, 55, and 56 are privileged materials.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to and the subject matter of this litigation.

2. The plaintiffs adequately represented the interests of persons similarly situated, for purposes of enforcing the rights of SAF under Civil Rule 23.1.

3. No enforceable employment agreement between the defendant McDonald and SAF came into being and that claim should be dismissed.

4. Alan M. Gottlieb has not misused SAF funds, or illegally diverted financial contributions form SAF.

5. Alan M. Gottlieb did not breach any fiduciary duty to SAF in connection with business transactions between SAF and Royal Printers, Merril Mail Marketing, or Merrill Associates.

6. Alan M, Gottlieb did not breach any fiduciary duty to SAF by participating as an interested party in the purchase, partition and cross-leasing of the real estate known as Liberty Park, nor did he thereby acquire any illegal financial benefit.

7. Trustees Jeffrey D. Kane, Samual Slom, Willis Hobart, and John Snyder did not breach their fiduciary duties to SAF.

8. Trustees Jeffrey Kane, Samual Slom, Willis Hobart and John Snyder did not engage in self-dealing, or improperly take from SAF any funds.

9. Mr. Gottlieb had an obligation to fully disclose to the Board of Trustees of SAF the specific information known to him and contained in the opinion letter of counsel before presenting the transaction to the board

for final approval of the reciprocal leases and partition agreement.

10. Judgment in this matter should provide that the Board of Trustees of SAF shall have 120 days to either affirm the Liberty Park transaction or to have the Gottliebs purchase SAF's interest in Liberty Park. If they should elect not to affirm the transaction, then the Gottliebs should be required to purchase SAF's interest in Liberty Park within 6 months of the Board's decision. The purchase price is to be the amount of funds invested by SAF in the purchase of the property, together with interest at the prime rate during this period. The lease payments would not be affected.

11. By reason of their association with SAF, the plaintiffs had a qualified or conditional privilege to publish information to SAF contributors and to the media about the management of SAF and Mr. Sottlieb's relationship to SAF. For example they would be privileged to report, after an impartial investigation, or upon a reasonable belief in the truth thereof, the following matters:

A. The details of Mr. Gottlieb's conviction;

B. The information as to Gottlieb relatives on the payroll;

C. Any personal dealings with the corporation;

D. The information pertaining to Liberty Park real estate transaction;

E. The salary and income of Mr. Gottlieb from SAF;

F. The payments for the Spokane travel expenses by Mrs. Gottlieb;

G. The use of the facilities at Liberty Park by Gottlieb's private corporations, to the extent utilized; The foregoing are just illustrative of the areas in which the plaintiffs would have a legitimate, qualified privilege to report.

12. Reference to the publications as a whole shows that the plaintiffs have abused the privilege in numerous instances.

13. Messrs. McDonald, Garrison Basso and Zimmer, and Ms. Bater and McDaneld defamed SAF with their publications.

14. Messrs. McDonald, Garrison, Basso and Zimmer, and Ms. Baxter and McDaneld defamed Alan Gottlieb with their publications.

15. SAF and Alan Gottlieb are public persons, for purposes of the publications at issue in this case.

16. The defamatory statements were made by the defamation defendants willfully and with actual malice.

17. Even though the plaintiffs abused their qualified privilege, SAF and Alan M. Gottlieb are entitled to damages only for those false and defamatory statements published relating to subjects or published to persons outside the scope of the qualified privilege.

18. SAF was damaged in the amount of $5,000 by the defamatory statements, and Alan Gottlieb was damaged in the amount of $25,000 by the defamatory statements.

19. The plaintiffs' liability for damages varies according to the extent of their participation in publishing the defamatory statements.

20. The Articles and Bylaws, together with the statutes relied on, do not create a membership with voting rights. The issuance of membership cards and other acts and mailing by SAF referring to members, although it may give the contributors some rights and benefits, does not create a voting membership by estoppel.

21. SAF has not been operating in violation of its own articles and bylaws, or state law, regarding membership rights, including the right to vote.

22. The plaintiffs should be permanently enjoined from use of the names and addresses originally taken from SAF and all such lists, extracts, and copies should be returned to SAF.

23. The plaintiffs should be enjoined from the use of the name "Save SAF", or "Save the Second Amendment Foundation", or any other lesignations substantially similar.

24. SAF has met the prerequisites for the issuance of a permanent injunction, and the Preliminary Injunction issued in this case on October 1, 1984, should be made permanent, with appropriate revisions regarding return of SAF contributor lists and all information extracted from SAF's computer print outs.

25. The defendants, on their counterclaim for defamation, should have judgments in the amount and against the parties indicated:

A. Mr. Gottlieb should have damages of $25,000 apportioned as follows:

1. Against the plaintiff McDonald in the full amount;

2. Against the defendants Garrison, Zimmer and Basso in the amount of $2,500 maximum;

3. Against any of the other defendants in the amount of $1,000 maximum.

B. For SAF in the amount of $5,000, apportioned as follows:

1. Against the plaintiff McDonald in the amount of $2, 500 maximum,

2. Against each of the other defendants in the amount of $1,000.

26. SAF, CCRKBA, CDFE, and Mr. Gottlieb are entitled to have have returned to them the original and every copy of documents covered by prior Court orders providing for their return, or covered by counsel's stipulation of October 24, 1985.

27. SAF, CCRKBA, CDFE and Mr. Gottlieb are entitled to have returned to them all copies of all other aocuments produced by them in the course of discovery, or taken from SAF by Mr. McDonald or the other plaintiffs in Cause No. 84-2-12625-6.

28. SAF is entitled to have sealed and protected from dissimination to third parties, exhibits 39, 40, 43, 46, 47, 51, 56 & 57. The sealed exhibits should be opened only on court order after notice to counsel of record for SAF and the trustees in these proceedings.

DONE IN OPEN COURT this 8th day of October, 1986.

/s/ Frank D. Howard
FRANK D. HOWARD, Judge

PRESENTED BY:
LeSOURD & PATTEN, P. S.
Carl J. Carlson
Attorneys for SAF and Trustees

ESSENBURG & STATON
Jan Essenburg
Attorneys for Alan Gottlieb

Appendix E
Judgment and Injunction

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

GREGORY R. McDONALD; WILLIAM L. GARRISON, JR.; SAMUEL J. BASSO; COLLEEN McDANELD; SANDRA S. BAXTER; and DOUGLAS J. ZIMMER, Plaintiffs, v. THE SECOND AMENDMENT FOUNDATION, a Washington nonprofit corporation; ALAN M. GOTTLIEB; JEFFREY D. KANE; JOHN M. SNYDER; WILLIS HOBART; and SAM SLOM, Defendants.	NO. 84-2-12625-6 84-2-12934-4 JUDGMENT AND INJUNCTION CLERK'S ACTION REQUIRED
THE SECOND AMENDMENT FOUNDATION, a Washington nonprofit corporation; and ALAN M. GOTTLIEB, Plaintiffs, v. GREGORY R. McDONALD; WILLIAM L. GARRISON, JR.; SAMUEL J. BASSO; COLLEEN McDANELD; SANDRA S. BAXTER and JOHN DOE BAXTER, her husband and the marital community composed thereof;	

and DOUGLAS J. ZIMMER and)
JANE DOE ZIMMER, and the)
marital community composed)
thereof,)
Defendants.)
)

This matter was tried before the undersigned Court between October 28-November 18, 1985, and March 17-April 4, 1986. Each party appeared by counsel, presented testimony, exhibits, and argument. This Court, having previously entered Findings of Fact and Conclusions of Law, now enters the following Judgment:

1. All claims by Gregory R. McDonald, William L. Garrison, Jr., Samuel J. Basso, Colleen McDaneld, Sandra Baxter, Douglas Zimmer, Glenn Anderson and D. Bruce Moriarity against The Second Amendment Foundation, Alan M. Gottlieb, Jeffrey D. Kane, John M. Snyder, Willis Hobart and Samuel Slom are dismissed with prejudice.

2. Gregory R. McDonald's cliam for breach by The Second Amendment Foundation of an employment contract is dismissed with prejudice.

3. Alan M. Gottlieb is awarded judgment against Gregory R. McDoanld, William L. Garrison, Samuel J. Basso, Douglas Zimmer and Jane Doe Zimmer, and the marital community composed thereof ("Zimmer", below), Sandra Baxter and T. T. Wyatt Baxter, and the marital community composed thereof ("Baxter", below) and Colleen McDaneld, as follows:

(a) Against Gregory R. McDonald in the amount of $25,000;

(b) Against Basso, Zimmer and Garrison, in the amount of $2,500 each; and

(c) Against Baxter and McDaneld, in the amount of $1,000 each;

(d) Provided, however, that the total recovery by Alan Gottlieb from the parties shall in no event exceed the total of $25,000.

4. The Second Amendment Foundation is awarded judgment against Gregory R. McDonald, William L. Garrison, Samuel J. Basso, Douglas Zimmer and Jane Doe Zimmer, and the marital conunity composed thereof ("Zimmer", below), Sandra Baxter and T. Wyatt Baxter, and the marital community composed thereof ("Baxter", below) and Colleen McDaneld as follows:

(a) From transacting, or attempting to transact, any business for or on behalf of The Second Amendment Foundation ("SAF").

(b) From taking possession of any additional documents, or property, of SAF.

(C) From showing or divulging to any third person the originals or any copies of any of the information taken by them on or around August 31, 1984, from the offices in which SAF is located.

(d) From using, or retaining in any form whatsoever, any contributor lists or computer records pertaining to contributor names, addresses, or contribution history. Said parties shall within thirty (30) aays of the date of this Judgment return to attorneys for SAF all copies of lists of contributors' names, addresses or contributor history, and every bit of information, however retained or held, derived from such lists, in their posses-

sion or control or which they have distributed to third parties. This Judgment specifically includes, but is not limited to, new compilations of names and information substantially derived from such sources, including all compilations of contributors to the "Save SAF" group. No use of such information shall be made pending further order of the court.

(e) From using, or applying to themselves, the name "Save the Second Amendment Foundation", the "Save the Second Amendment Foundation Committee", " SAVE SAF", or similar designations using the words "The Second Amendment Foundat ion" or "SAF".

6. The Second Amendment Foundation shall be reguired to post no bond in connection with the issuance of this injunction, and the surety on the bond previously posted for the preliminary injunction is hereby released from any liability on that bond.

7. The Board of Trustees of The Second Amendment Foundation shall have 120 days from the date of this Judgment to elect to either affirm, or disaffirm, SAF's participation in the purchase ofthe Liberty Park property. If the Trustees should elect to disaffirm that transaction, SAF shall sell its interest in the property to Mr. Gottlieb, and Mr. Gottlieb shall pay SAF for that interest, within six months from the date of the Trustees' decision. The price to be paid for SAF's interest shall be the amount expended by SAF in acquiring its original interest in the property, together with interest at the prime rate from the date SAF made such payments.

8. The plaintiffs in Cause No. 84-2-12625-6 shall return to attorneys for SAF within 30 days after the conclusion of this litigation and the expiration of appeal

periods, every copy of the following materials, however stored or retained:

(a) All checkbooks and check registers maintained by the Service Bureau Cooperative produced pursuant to this Court's Order dated October 1, 1984 (Docket No. 67);

(b) All files in plaintiff's possession relating to a Post Office appeal brought by the CCRKBA, produced pursuant to this Court's Order of October 1, 1984 (Docket No. 69);

(C) All information extracted from the SAF word processing system, and produced pursuant to this Court's Order dated October 1. 1984 (Docket No. 68); except those items which are exclusively personal to Mr. McDonald.

(d) All documents covered by subpoenas issued prior to October 1, 1984, and all check registers and cancelled checks of the Service Bureau Cooperative, produced pursuant to Court Order dated October 1, 1984 (Docket No. 66);

(e) All documents produced pursuant to the Order on Show Cause Hearing filed February 8, 1985 (Docket No. 196);

(f) All documents produced by SAF from its attorneys' files relating to Liberty Park, produced pursuant to stipulation of counsel on October 24, 1985.

This paragraph applies to all copies of all such documents, including the original exhibit copies which were filed in Court, when returned by the Clerk. Prior to return of those documents, no party shall further disseminate or disclose any copies of the documents, or

excerpts thereof, to any third person other than to the extent necessary to prosecute this action or appeals of this action.

9. Plaintiffs in Cause No. 84-2-12625-6 shall return to counsel for SAF and counsel for Mr. Gottlieb all copies of all other documents produced by SAF, CCRKBA, CDFE or Mr. Gottlieb in the course of discovery in this case, or documents pertaining to the affairs of those entities which were taken by Mr. McDonald or the other plaintiffs in Cause No. 84-2-12625-6 from the SAF offices. All such documents shall be returned to counsel for SAF and Mr. Gottlieb within 30 days of the conclusion of this litigation or the running of the time within which this action be appealed further.

10. With respect to the documents produced by SAF from it's attorneys' files on Liberty Park, the following shall apply:

(a) The Clerk is ordered to seal, and to prohibit disclosure (without prior order of this Court) of Exhibits 39, 40, 43, 46, 47, 51, 55 & 56l

(b) All copies of all such documents, and all excerpts thereof in its possession or available to them (including all copies of the UP IN ARMS! dated January, 1986) shall be returned to counsel for SAF within 30 days of tbe conclusion of this litigation, or the running of the time within which this action may be further appealed;

(c) Prior to return of the documents, no party shall, without prior Court order, distribute or disclose any of those documents to any third party except to the extent necessary to prosecute this litigation.

11. SAF is awarded judgment for its recoverable costs against McDonald, Garrison, Basso, McDaneld,

Baxter, Zimmer, Glenn Anderson, and D. Bruce Moriarity in the amount of $1,921.24, and Mr. Gottlieb is awarded his recoverable costs against the the same parties in the amount of $125.00.

12. This judgment, including costs, shall bear interest at the rate of 12% per annum.

SUMMARY

In favor of Alan Gottlieb against:

Gregory McDonald	$25,000	$125.00	$25,125
Samuel T. Basso	2,500	"	2,625
William Garrison	2,500	"	2,625
Douglas Zimmer	2,500	"	2,625
Sandra Baxter	1,000	"	1,125
Colleen McDaneld	1,000	"	1,125
Glenn Anderson	0	"	125
D. Bruce Moriarty	0	"	125

In favor of The Second Amendment Foundation against:

Gregory McDonald	$ 2,500	$1,921.24	$ 4,421.24
Samuel T. Basso	1,000	"	2,921.24
William Garrison	1,000	"	2,921.24
Douglas Zimmer	1,000	"	2,921.24
Sandra Baxter	1,000	"	2,921.24
Colleen McDaneld	1,000	"	2,921.24
Glenn Anderson	0	"	1,921.24
D. Bruce Moriarty	0	"	1,921.24

Provided: Maximum total recovery of principal by Alan Gottlieb from all parties limited to $25,000; by The Second Amendment Foundation to $5,000.

Maximum recovery of costs, from all parties combined, shall not exceed $1,921.24 by SAF, or $125 by Alan Gottlieb.

This judgment bears interest at, the rate of 12% per annum.

DONE IN OPEN COURT this 8th day of Oct., 1986.

/s/ Frank D. Howard
FRANK D. HOWARD, JUDGE

Appendix F
Memorandum on Show Cause Re Temporary Receiver

IN THE SUPERIOR COURT OF
THE STATE WASHINGTON
FOR KING COUNTY

GREGORY R. McDONALD; et al. Plaintiffs, v. THE SECOND AMENDMENT FOUNDATION, ALAN M. GOTTLIEB, et al. Defendants.	NO. 84-2-12625-6 84-2-12934-4 MEMORANDUM OPINION ON SHOW CAUSE RE TEMPORARY RECEIVER

This was a hearing on show cause regarding the question of whether a receiver should be appointed to take charge of the affairs of the defendant foundation pending trial on the merits. The parties stipulated that there should be live testimony. The court imposed limitations, but nonetheless eight days were allowed.

Alan Gottlieb, defendant, founded the Second Amendment Foundation in 1974. It enjoys IRC § 501(c)(3) income tax status under federal law. It has grown into an institution annually raising several millions of dollars in support of its interpretation of the second amendment to the U.S. Constitution -- the right to keep and bear arms. The plaintiffs were virtually all of the employees of the Foundation. There were fired by Mr. Gottlieb, Foundation president, on August 31, 1984. The contend that Mr. Gottlieb and other defendants (trustees of the foundation;) are quilty of wrongdoing and mishandling of the Foundation and its assets in such a manner as to jeopardize the tax status and very life of

the Foundation. They seek the extraordinary remedy of the ouster of Gottlieb and the appointment of a temporary receiver. The law places a heavy burden on any persons who would have a court force incumbent officers out of a private organization. Plaintiffs rely upon RCW 24.03.265 and .270 and the cases of *Henry George v. Cooper*, 95 Wn.2d 944, *Cameron v. Groveland*, 20 Wash 169, and others. If the jurisdictional requirements of the law are met the law nonetheless leaves it to the discretion of the trial court whether or appoint a receiver.

The first question is whether plaintiffs have standing. Judge Little has heretofore entered an order (October 15, 1984) specifically allowing 19 named persons to become plaintiffs if they sign the complaint. They have not yet been given the opportunity to do that. I proceed under the assumption that at least one of them will. The more basic question is whether the Foundation has *any* members. Only members have standing. Under the non-profit corporation statute in Washington (RCW 24.03.065) it is legally possible that there not be members, but only if that fact is expressly stated in the articles or by-laws. The Foundation's articles and by-laws do not so state. Moreover, Mr. Gottlieb (who has at all times remained the dominant authority in the life of the Foundation) admits that he has confirmed membership on thousands of contributors, but he seeks to take the position that that was merely a fund-raising gimmick; that in fact the Foundation has no members. The words should stick in his throat. He and the Foundation are estopped by their conduct over the years in confering memberships. If any of the 19 previously identified and the six plaintiffs already names have been previously accorded membership they have standing. Among the six names plaintiffs I find that only Sam Basso is a member. He was given a membership card legitimately by

the organization in 1982 when he was working substantially as a volunteer and again in 1983 when he had become an employee of the Foundation. He has standing to bring this lawsuit. On August 31, 1984, after they had been fired, plaintiff Greg McDonald manipulated the people and machinery at the Foundation such that membership cards were issued for 1984 to Mr. McDonald and the other four plaintiffs. None of them had prviously made contributions to the Foundation; their "membership" was a contrivance attempted to attain status. They are not members and do not have standing.

The questions then becomes whether the Foundation is now in a situation of such dire straits that a temporary receiver should be appointed. A new executive director has been appointed. Business is being attended to. The problem largely centers on the fact that Mr. Gottlieb has, since 1984, been incarcerated in federal prison in Eastern Washington. He will be there for one year and one day as a result of a sentence imposed against him.

Mr. Gottlieb has continued to control the corporation from prison. He caused the Foundation to pay him his regular $2,000 salary, even though federal regulations (28 C.F.R. Sec. 540.13(e)(3)) prohibit a prisoner from operating any business enterprise. The trustees have, since the suit was instituted in early September, had a trustees meeting at which they have decided to terminate Mr. Gottlieb's salary.

Mr. Gottlieb has also caused the Foundation to pay part of the airfare the travel expenses for his wife, Julie Gottlieb, to visit him at the federal prison in Spokane. There was evidence from which one could conclude that some business was carried on by Mr. and Mrs. Gottlieb

in behalf of the Foundation. (Mrs. Gottlieb is employed full time in one or more of the business and non-profit operations related to the foundation). Now that Mr. Gottlieb has had his salary terminated and, presumably, will no longer direct any of the businesses, there will be no justification, and presumably no likelihood, that such payments will be forthcoming. The Foundation's auditors, Coopers & Lybrand, are now undertaking, pursuant to resolution of the trustees, an audit to check into this matter and several of the other allegations of the plaintiffs.

It may be appropriate to stop here and comment about Coopers & Lybrand and several of their employees who testified at the hearing. Coopers & Lybrand is one of the major accounting firms in the world. They have been the tax consultants and auditors of the Foundation ever since 1976. They prepare audited financial statements annually. Mr. William Parker, partner in charge of this account, has outstanding credentials and has been very close to the Foundation and to Mr. Gottlieb. He exhibits some bias in favor both of the purpose of the Foundation and in favor of Mr. Gottlieb and the trustees. However, I have no reason to doubt that he will be thorough and conscientious in his direction of the audits because of the standards demanded of certified public accounts in their auditing tasks and also of course because of the publicity and attention that this law suit has and will draw to the operations of the Foundation.

It is also alleged that Mr. Gottlieb has caused personal employees from his private businesses to be on the Foundation payroll. There was some rather confusing evidence about that, and I am not at all clear whether that is likely to be proven at trial. That is certainly one of the items that Coopers & Lybrand will be examining.

A number of the allegations in the complaint relate to the acquisition of land and the office building where the Foundation is now headquartered, and in which several of the related non-profit as well as profit operations are located. It is alleged that Mr. Gottlieb obtained a $125,000 personal loan from the Foundation, that for an $8,000 cash investment of his own, he and his wife will ultimately have full ownership of the building which is worth several hundreds of thousands of dollars. There are rather complicated leasing arrangements covering the land (owned by the Foundation) and the building. It is also alleged that the rent charged the Foundation for its space in the building is grossly excessive. The evidence was in considerable conflict as to all of these matters. I make no final conclusions about the propriety of what was done. On the face of it, it appears most surprising if true the Mr. Gottlieb has only invested $8,000 and will eventually own the building. There is clear concern and reason to expect a careful audit, including appraisals. The defendants point out that the law in Washington does not flatly prohibit self dealing if there is a full disclosure. However, full disclosure normally would mean disclosure to stockholders and members who would not necessarily have an extremely close relationship to Mr. Gottlieb. The fact is that this Foundation has been run entirely by Mr. Gottlieb and found other very close long-time friends of his who are trustees with him of the Foundation and the related profit and non-profit entities. "Full disclosure" to them is scarcely any real protection if one considers the interest of contributors who have no knowledge of these affairs. There is no emergent problem about the rents, however, as the leases are in place and there is no reason to believe that hasty action might be needed by a neutral receiver if it is ultimately determined that the rent structure and the leases and ownerships are inappropriate or unlawful.

A number of other allegations in the complaint relate to whether Mr. Gottlieb caused the Foundation to pay more than its fair share of electrical, janitorial and other such bills, whether it pays more than its fair share of telephone, furniture and equipment, and computer costs. Mr. Gottlieb will no longer be controlling these businesses while in prison, and thee again are items that Cooper & Lybrand will be auditing with greater care presently. It is also alleged that Mr. Gottlieb has required that all printing and mailing of the Foundation be done by his private business known as Royal Printers and Merril Mail Marketing. There is conflicting evidence about whether the rates charged the Foundation are excessive and also whether there have been any double billings. There also were concerns expressed that Mr. Gottlieb manipulated the payments of bills by the Foundation so that his private businesses always received priority treatment if cash were not available. Again, there is conflicting evidence, and I am not at all sure that these allegations will prove to be well founded.

There was considerable testimony regarding the authoring, publishing, and sale of a book entitled *Rights of Gun Owners*. Mr. Gottlieb conceived of the idea for the book and had it written by members of the Foundation staff, except for the introduction and the reviews (published on the back jacket of the book) which were written by Mr. Gottlieb. The concerns about who was the true author are not of much moment, but there was some conflicting testimony about whether Mr. Gottlieb received royalties. Apparently he did not. Most of the testimony centered on some very confusing efforts to determine whether a substantial number of the books were given away by the Foundation without adequate compensation to one or another of the related companies. If so, it could possibly jeopardize the income tax

status of the Foundation. It appears likely to me that at ultimate trial it will be determined that several thousand copies of the book have indeed be given to one or another of the non-profit corporations without compensation. Again, however, I do not think that this presents any kind of an emergency situation, and it is highly unlikely that that practice will continue in light of the filing of this suit and the attention focused on the matter.

The Foundation has become a very grand financial success. It appears to have between $300,000 to $400,000 in cash assets available at all times, and Mr. Gottlieb has for quite some time required that a minimum $150,000 be kept in the Foundation's checking account at a newly-formed savings institution in Bellevue entitled Summit Savings. Mr. Gottlieb caused the Foundation to purchase about $68,000 worth of the common stock of this new savings institution and he has also purchased over $200,000 in certificated of deposit there. It appears that plaintiff Greg McDonald concurred in many of these arrangements with Summit. He now points out, however, in light of the limit of $100,000 on Federal Savings and Loan Insurance Corporation liablility, it is presumably improvident for the accounts to be managed in this way. There appears to be good ground to be concerned in this regard, and I trust that under that attention now being focused both by the audit and this law suit, these accounts will be brought within more conservative limits.

One of the primary complaints relates to the possible jeopardy to the tax status of the corporation by many of the activities mentioned above, but also concerning the evidence that contributions may have been made by the Foundation for the U.S. Senate campaign of Mr. Lloyd Cooney. Such contributions are absolutely

prohibited under the laws regarding 501(c)(3) institutions. Greg McDonald was campaign manager for Mr. Cooney's campaign in 1983. It appears that he, Mr. Gottlieb, and many others at the Foundation were very supportive of Mr. Cooney. In September 1983 bonsues of $1,500 each were paid to Mr. Gottlieb, Mr. McDonald, and several other key Foundation employees with the clear, explicit understanding that, after deducting appropriate amounts for the income tax that each recipient would expect to pay on the bonus, the remaining funds (about $1,000 in most cases) were donated to the Cooney campaign. Mr. McDonald claims that his doing so was not illegal because there was no condition on his bonus. When this matter is finally examined I will be surprised if there is any legitimate distinction between the contributions made by Mr. McDonald and those through Mr. Gottlieb.

It is a very interesting questions to consider the responsibilities of the trustees and the rights of "members" in a non-profit corporation such as the Foundation. The trustees apparently have in the past met only once annually for a few hours. Like most corporations and foundations the active staff are the only ones who truly know anything about the day-to-day operation or have much concern about it. This Foundation has millions of dollars in annual income and can, as here, be run largely at the direction of a single strong individual such as Mr. Gottlieb. Ultimately at trial it may be necessary for the judge to consider these matters further as they relate to control and voting rights, if any, of members.

I am satisfied that under the arrangements that now pertain, with Mr. Gottlieb no longer drawing a salary and presumably no longer able to operate the business, particularly in the light of the audit and the glare of this

trial and its attendant publicity, that a temporary receiver is not necessary. Concerns expressed eloquently by counsel for the plaintiff that instead of the funds being used for the educational purposes of the Foundation, they are apparently being accumulated to purchase a building and to draw interest in accounts, can be addressed at a future time and do not present an emergency.

Finally, in deciding whether to exercise my discretion to appoint a receiver, I have considered the likely effect on the Foundation. The very purpose of plaintiffs in bringing this suit is to save the Foundation. Regardless of one's views of the organization and of which side will ultimately prevail, the overriding present issue for me as judge is to decide what steps taken now will preserve the Foundation for the intervening period until trial. It appears quite clearly to me that Mr. Gottlieb (principally) and the other trustees (to a lesser extent) have been the central focus and sole leadership of the Foundation. Doubtless, the vast majority of contributors/members identify the organization with Mr. Gottlieb. The appointment of a receiver vehemently opposed by Mr. Gottlieb and the trustees would very likely be a severe blow to the Foundation. It probably is true that it would have just the opposite effect for some contributors/members. I cannot be sure, but it is my judgment that the Foundation is more likely to ride through the storm until trial if a receiver is not appointed. I do believe that some court-ordered conditions should be imposed, including the following:

1. No bank account should stand at more than $100,000.

2. There shall be no bonuses issued to any employees without specific court order.

3. No salary or expenses shall be paid to Allen Gottlieb.

4. Ms. Julie Gottlieb should not be employed by or given any remuneration by the Foundation.

5. Coopers & Lybrand reports and audits should be made available to plaintiffs.

I direct that counsel prepare the proposed order for my signature promptly and that if you cannot sooner agree on the form of the order there he a hearing on Friday, November 16 at 4:00 p.m. to settle the matter.

/s/ Robert W. Winsor
ROBERT W. WINSOR, JUDGE

Appendix G

Constitution of the United States

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV

Section I

All persons born or naturalized in the united States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section II

Representatives shall be apportioned among the several States, according to their respective numbers, counting

the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section III

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section IV

The validity of the public debt of the United States, authorized by law, including debts incurred for payment

of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section V

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

NO. 89-585

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GREGORY R. McDONALD, WILLIAM L. GARRISON, JR., SANDRA BAXTER, T. WYATT BAXTER, DOUGLAS J. ZIMMER MERRI JO ZIMMER, SAMUEL J. BASSO and COLLEEN McDANELD,

Petitioners,

v.

THE SECOND AMENDMENT FOUNDATION and ALAN M. GOTTLIEB

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. RESPONSE TO PETITIONERS' STATEMENT OF THE CASE.

Mr. McDonald's statement of the case is incomplete, frequently wrong and always sharply slanted. The trial court's Findings and Conclusions[1] and the Washington Court of Appeals opinion[2] give a dispassionate statement of the true facts.

This is not a case, as McDonald puts it, of "a state court system run amok". The trial court listened for six full weeks to McDonald's[3] irresponsible shotgun allegations

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[1] Appendix D to the Petition for Writ of Certiorari

[2] Appendix A to the Petition for Writ of Certiorari

[3] Greg McDonald, former executive director of the Second Amendment Foundation, leads and dominates his group, who are the petitioners. See Court of Appeals Opinion, attached to Petition for Writ of Certiorari at A-4. Mr. McDonald writes the briefs and memoranda for his group. The petitioners are referred to collectively in this response as "McDonald" or "the McDonald Group".

against Alan Gottlieb and the Second Amendment Foundation's Trustees. The trial court had the opportunity to observe Mr. McDonald and his friends on the witness stand at length. After doing so, it entered detailed Findings of Fact and Conclusions of Law dismissing every one of McDonald's accusations. Most of the charges were dismissed at the conclusion of the plaintiffs' case, when McDonald failed to make even a prima facie case. But then, it was too late. McDonald and his group had, for more than a year, repeatedly sent mass mailings to the Foundation's high dollar donors and to every significant gun-related publication in the country, trumpeting as fact -- without having to prove -- their accusations. McDonald's mass mailings, which he has not certified up to this Court or included as one of his many appendices, were virulent, accusing Alan Gottlieb of stealing money from the contributors and

systematically engaging in criminal conduct. The resulting defamation claim against McDonald and his colleagues was not used as a "political weapon." It was the only remedy the legal system provides.

The state court appellate system likewise gave McDonald every opportunity to present his case. It granted him extensions of time to file his Brief on Appeal. (He filed his opening brief a full year after the trial court entered its written judgment.) Washington State's appellate rules allow 70 pages for a brief on appeal. McDonald asked for and received, over objection, permission to exceed those limits, and he filed a 157 page brief. Two weeks before oral argument, McDonald sought leave to file what was represented to be an amicus curiae brief. The Foundation and Mr. Gottlieb

objected.[4/] The appellate court allowed the amicus brief to be filed. Washington's appellate rules limit an amicus brief to 30 pages. This one was 74 pages. McDonald had the opportunity to move the appeallate court for reconsideration. He did. He lost. He had the right to petition the State Supreme Court for review. He did. He lost. McDonald has nothing to complain about except the result: he has been unable to convice a single judge on a single claim to date.

McDonald consistently fails in his Petition to present with accuracy the facts surrounding this case. He states as fact, at page 3, that this is a case of (1) "concerned citizens"

[4/] The Foundation and Mr. Gottlieb contended that the brief reflected no familiarity with the true facts of the case, appeared biased, and raised totally new issues. Indeed, shortly after the Court of Appeals issued its decision, the author of the "amicus" brief, who was personally acquainted with Mr. McDonald, began representing McDonald and his friends as their counsel.

(2) who attempted to blow the whistle (3) on "someone . . . who diverts [charitable] funds for his own benefit." This misrepresents the case:

(1) McDonald and his group are all ex-employees with an axe to grind. The Court of Appeals opinion describes the dispute as "a major 'corporate battle' for control of SAF" between McDonald and Alan Gottlieb. Appendix A to Petition for Writ of Certiorari, at A-4.

(2) The trial court found as a fact that none of them had tried to "blow the whistle" on anything. (Finding of Fact 58).

(3) The trial court entered findings and conclusions that:

> Mr. Gottlieb did not illegally divert contributions from SAF to his use.

Finding of Fact 72. And:

> Alan M. Gottlieb has not misused SAF funds, or illegally diverted financial contributions from SAF.

Conclusion of Law 4. The trial court further concluded that neither Mr. Gottlieb nor the

trustees breached any fiduciary duties. (Conclusions of Law 5, 6, 7.) McDonald ignores these facts and gives this Court a distorted picture of this case.

McDonald flatly declares as fact, at page 3, that on August 31, 1984 he and his friends "were fired from their jobs with SAF by Alan M. Gottlieb and by Michael Kenyon, acting on instructions of Gottlieb." This is not true. The trial court found that on August 31, 1984, while Mr. McDonald was fired,

> Neither Mr. Gottlieb, nor SAF, fired other SAF employees on or around August 31, 1984. Those employees who did not return to work the following work day did so because they had elected to join with Mr. McDonald in suing SAF and Mr. Gottlieb.

Finding of Fact 59. The Court of Appeals found "overwhelming support" for this finding of fact. Court of Appeals opinion, attached as Appendix A to Petition for Writ of Certiorari, at A-13. McDonald simply ignores the facts, and presents this Court with his lonely and twisted personal interpretation of reality.

At page 4, McDonald states he filed his complaint that same day, which is incorrect. McDonald apparently wishes to imply that he and his group were fired because they filed the complaint. A summons, alone, was filed that day after McDonald was fired. The Complaint was not filed until several days later.

As page 4, incredibly, McDonald states as a fact, that

> "Petitioners' employment was terminated because they had questioned Gottlieb's use of SAF funds and what they perceived to be his self-dealing."

The trial court specifically addressed this accusation and found that not only was it false, but McDonald's group knew it was false. See the trial court's detailed recitation of the facts in Findings of Fact 55-60. McDonald did not assign error to finds nos. 56-58 and the Court of Appeals held that

the other findings were supported by either substantial or overwhelming evidence. See Appendix A to Petition for Writ of Certiorari, at A-9, A-13.

At pages 4-6, McDonald paraphrases in mild language some of the allegations from his Complaint. This was not the language used in his Complaint and it certainly was not the language he used in his defamatory mass mailings. In any event, the trial court found every one of these allegations to be factually or legally without merit, and the Court of Appeals after reviewing the huge record found substantial or overwhelming evidence to support the trial court's findings. It seems a bit odd for McDonald to recite here his discredited suspicions. But when McDonald states as fact that "these concerns" were what lead to his firing, he seriously misrepresents the record. See Findings of Fact 55-60, ibid.

At page 6 McDonald states blandly as fact that his group "formed an ad hoc committee" and began mailing "newsletters" to Foundation members "to keep them informed of the litigation". McDonald fails to advise the Court that his ad hoc committee (1) took confidential lists of the Foundation's donors while they were employed by the Foundation (Findings of Fact 78, 79), (2) targeted their mailings at some of SAF's best contributors (on one occasion, about 7,000 such contributors) (Finding of Fact 63), (3) published many false and defamatory statements in those mailings (Findings of Fact 53-60), (4) used the Foundation's donor lists to solicit over $22,000 in contributions on their own behalf (Finding of Fact 80), and (5) used names and format in their fundraising confusingly similar to the Foundation fundraising solicitations. McDonald misleads when in his Petition he tells this Court that

his group just "published a newsletter which was mailed to SAF members to keep them informed of the litigation".

At page 6, McDonald represents as fact that the Foundation and Mr. Gottlieb filed a complaint stating that "the . . . mere act of filing a complaint against Gottlieb and SAF was itself defamation." This is inaccurate. McDonald didn't just file a complaint. Unlike most litigants, when McDonald filed his complaint he and his group held a press conference and distributed press releases attacking the Foundation and Mr. Gottlieb.

Shortly after filing his complaint, and long before trial, McDonald moved for appointment of a temporary receiver for the Foundation. A show cause hearing was held in early November, 1984 (nearly two years before the trial court's October, 1986 Findings and Conclusions). McDonald quotes phrases from the court

memorandum following that preliminary hearing, and inexplicably attaches that order (without a date) as Appendix F. That interlocutory order ceased to be of any effect once trial began, and it played no role in the trial. It is true that McDonald's accusations at that early hearing created concern in the mind of the hearing judge. Among other things, that judge ordered Coopers & Lybrand, the Big Eight accounting firm which regularly audited the Foundation, to prepare a report analyzing McDonald's claims. After the full trial, which considered the Coopers & Lybrand audit report, all of those concerns were found to be unwarranted.

It appears that McDonald quotes this interlocutory order for the proposition that (1) there had been a judicial "finding" that all of his group "had been fired", and (2) he later simply repeated what the judge said. This is false. The petitioners' termination of

employment was not even an issue at the temporary receivership hearing. The issue was whether a receiver should be appointed. Defamation issues were not addressed. The hearing judge's comment was simply part of his reciting what appeared to be uncontested background events. The trial court, following trial, found as a fact that McDonald's friends had not been fired, they knew it, and they lied knowingly when they said they had been. Findings of Fact 55-60. The earlier hearing judge's comment did not change the facts, or what the McDonald group knew to be true. See further discussion infra, at 23-24.

At page 7, McDonald recites without support a purported series of events surrounding his Motion for Summary Judgment. McDonald omits to advise the Court that he (1) never objected to the trial court postponing decision on his Motion for Summary Judgment, and (2) did not on

appeal assign error to, or argue, those procedural events.[6] See discussion at 26-28, infra.

A. The Appellate Court Did Not Fail to Conduct a Constitutionally Adequate Review of the Trial Court Record.

McDonald's argument turns totally on the factual assumption that the Washington Court of Appeals failed to "conduct an independent examination of the evidence." This suggestion is baffling. The trial record, consisting of

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[6] The "amicus" brief, filed two weeks prior to oral argument, attempted to raise some of these many new issues, including the denial of the Summary Judgment motion. Under Washington law, appellate courts will not pass on issues raised only by amici curiae. Schuster v. Schuster, 90 Wn.2d 626, 629, 585 P.2d 130 (1978); Long v. Odell, 60 Wn.2d 151, 154, 372 P.2d 538 (1962). The Court of Appeals opinion did not address these issues.

more than 20 volumes of testimony, hundreds of exhibits, and voluminous clerks papers, was certified up to the Court of Appeals. The Court of Appeals' opinion repeatedly refers to reviewing the trial court record. It is unclear what more McDonald would have the Court of Appeals do. McDonald provides no support for the factual proposition that the Court of Appeals here failed to independently review the record.

Petitioners appear to urge that they have some argument analogous to that presented in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984). McDonald never raised this argument on appeal.[7] In that case, the plaintiff won a defamation judgment. A federal Court of Appeals reversed the trial court

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[7] See footnote 6.

finding of actual malice. The plaintiff appealed, alleging that Fed.R.Civ.P. 52 restricted the Court of Appeals in its review of the trial court's findings of fact. Fed.R.Civ.P. 52 provided, in part, that

> Findings of fact . . . shall not be set aside unless clearly erroneous. . . .

The U.S. Supreme Court granted certiorari

> to consider whether the Court of Appeals erred when it refused to apply the clearly erroneous standard of Rule 52(a) to the District Courts "finding" of actual malice.

466 U.S. at 493; 80 L. Ed. 2d at 511-512; 104 S. Ct. at ___. The Supreme Court held that it had not. The Court held that Fed.R.Civ.P. 52 did not prescribe the standard of review to be applied to findings of malice in defamation cases, and appellate judges in such a case must

exercise independent judgment and determine whether the record establishes actual malice with convincing clarity. 466 U.S. at 514; 80 L.Ed.2d at 526; 104 S.Ct. at ___.

No similar issue exists here. Washington's Superior Court Rules do not contain the language at issue in Bose limiting appellate review of factual questions to a "clearly erroneous" standard. Washington appellate courts review the entire record and require that there be substantial evidence to support the trial court's findings.

Here, the trial court entered findings of fact that McDonald's group had published many defamatory and false statements of fact (Findings of Fact 53-55). The court then held that "it was established by clear and convincing evidence" that many of the statements were published (1) with reckless disregard as to

their falsity, and (2) with actual knowledge that certain of their statements were false. (Findings of Fact 60) These are the legal equivalent of "actual malice". Hart-Hanks, Communications, Inc. v. Connaughton, 491 U.S. ____, 105 L.Ed.2d 562, 589, 109 S.Ct. ____ (1989).

The Court of Appeals, in its written opinion, held that there was substantial evidence to support the trial court's findings that such facts had been proved by clear and convincing evidence. Despite these trial and appellate court findings based on the evidence before them, McDonald states flatly, and wrongly, to this Court that the record was "absent" any evidence of malice. Petition for Cert., at 13, 14.

B. Evidence Was Introduced at Trial Establishing Actual Damages, and the Trial Court Did Not Award Damages for Privileged Statements.

The Washington State Court decisions here are consistent with the law declared by the Supreme Court. It is not statements of law, or applications of law, of which McDonald complains. He disagrees with factual findings. He complains about the lower court results. These are the core of his assertions of "constitutional error". These do not create issues appropriate for a Writ of Certiorari.

The trial court found that McDonald's group made statements with reckless disregard as to truth or falsity, and knowing specifically that certain statements were in fact false. (Findings of Fact 60). These findings legally support and justify the trial court's conclusion that defamatory statements were made "wilfully and with actual malice" (CL 16). Hart-Hanks Communications, Inc. v. Connaughton, supra.

McDonald states as a fact that "no . . . evidence of actual damages was introduced." Petition, at 16. This is false.

The trial court found as a fact that there were actual damages:

> As a result of publication of the false and defamatory statements, both Alan Gottlieb and SAF suffered actual damages. Alan Gottlieb was injured in his reputation and suffered mental anguish and personal humiliation. SAF was injured in its reputation and suffered an actual decline in contributions.

The Court of Appeals, reviewing the Repondent's claim that the damages awarded were too low, held that

> There was evidence of actual damage presented at trial and the trial court limited the award because a substantial portion of the damage was brought about by publication of statements in the areas in which the McDonald group had a qualified privilege to report. After a review of the record, we agree with the trial cout and find the damages awarded are within the range of the evidence presented and therefore adequate.

(Emphasis added.)

Opinion, attached as Appendix A-1 to McDonald's Petitition for Certiorari, at A-11.

McDonald may disagree with these factual conclusions and with the sufficiency of the evidence, but these disagreements are not grounds for a Writ of Certiorari.

McDonald complains that the trial court failed to segregate the damages he caused from damages suffered as the result of statements made on subjects protected by a qualified privilege.[8/] In fact, the trial court did (although it was not required to) segregate injury caused by statements covered by a qualified privilege (Findings of Fact 67) and

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[8/] McDonald also tries to argue that Mr. Gottlieb's reputation was already so damaged by his personal income tax problem that, apparently, it couldn't be hurt further by malicious lies. The trial court heard evidence, including far more evidence than that cited by McDonald, and concluded that Mr. Gottlieb's reputation was further damaged and reduced by McDonald's attacks.

explicitly did not award damages for those injuries (Conclusions of Law 17).[9/]

C. The Trial Court Did Not Err in Finding Statements by McDonald's Group to be Defamatory.

It is an exercise in the ridiculous when McDonald quotes from this Court's opinions for the proposition that in reporting on matters of public debate "some error is inevitable", "albeit regrettable". The trial court had before it vicious, repeated, calculated, defamatory mass mailings carefully targeted to Foundation contributors and important gun-rights individuals and organizations. It found there were many defamatory statements, published with actual malice (Findings of Fact 53-60, 68, 69;

9/ The Foundation and Mr. Gottlieb argued on appeal that, since the trial court found McDonald had abused the qualified privilege, damages should have been awarded for those statements as well. Restatement 2d of Torts, §§ 603, 604; Bender v. Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983); Ward v. Painters Local Union, 41 W.2d 859, 252 P.2d 253 (1953).

Conclusion of Law 16). We are not dealing here with some inevitable, regrettable, "error".

McDonald does not explain or argue his apparent position that the State courts' statements of law, or application of law, are inconsistent with this Court's opinions.

McDonald cites no law for the proposition that a trial court's factual findings have to be any more "specific" than were the findings here.[10] The parties, on appeal to the Washington State Court of Appeals, argued whether sufficient evidence was presented in the record to support those factual findings. The Foundation and Mr. Gottlieb cited the Court of Appeals to voluminous support in the record for those findings. The appellate court found either substantial or overwhelming evidentiary

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[10] In fact, the Foundation sought detailed listings of the defamatory statements in the Findings and Conclusions and McDonald argued with success against that level of detail in the Findings and Conclusions.

support for the trial court's factual findings. That is all the appellate review appropriate on this issue.

McDonald misrepresents when he suggests, at page 18, that the show cause hearing judge shortly after the filing of the Complaint "found" the McDonald group's statements about their firing "to be true". As discussed earlier the show cause hearing occurred before McDonald's hate campaign began. Defamation issues were not tried. Whether McDonald's group had been fired was not an issue. No "finding" was necessary to reach the receivership issue before the court, and the judge's comment was nothing more than a passing reference to what he thought was an uncontested background event.

McDonald's factual statement, that petitioners just "repeated the statement found to be true by one judge", is seriously false.

Compare the simple (though inaccurate) mention by the show cause judge that "the plaintiffs . . . were fired by Mr. Gottlieb, Foundation president, on August 31, 1984" with the trial court's finding No. 55, reciting the McDonald group's defamatory story regarding their termination. McDonald's group was not found guilty of defamation for repeating the judge's simple inaccurate statement that they "had been fired."

D. The Trial Court Did Not Find That Statements of Opinion or Anecdotes, the Filing of Legal Actions, etc. Were Defamatory.

Neither the trial court Findings and Conclusions, nor the Court of Appeals opinion, held that (1) statements of opinion or anecdotes, (2) the mere reporting of requests of government investigations, or (3) the filing of legal actions, were defamatory. McDonald simply misreads, or misrepresents, the materials appended to his Petition as appendices A and D.

McDonald, in this section, also appears unable to distinguish between (1) the fact of defamation, and (2) the abuse of a qualified privilege, which are distinguished and treated in the trial court's Findings of Fact as separate legal issues.

E. The Appellate Court Did Not Find that the Alcatraz Postcards Were Defamatory.

Again, the trial court cited the mailing of postcards to Mr. Gottlieb's wife, Mr. Gottlieb and others, as an example of the McDonald group's abuse of a qualified privilege to make statements to persons interested in the same subject matter. Not as defamations. Facts constituting abuse of a qualified privilege (e.g., excessive publication) are different from the facts making a statement defamatory.

In any event, as is discussed above, the trial court declined to award damages for statements that initially were covered by a qualified privilege (notwithstanding that the

privilege was abused). The trial court awarded no damages resulting from the emotional distress inflicted by the Alcatraz postcards.

F. The Appellate Court Did Not Err in Upholding the Trial Court's Decision on McDonald's Summary Judgment Motion.

Under Washington law denials of summary judgment are not generally appealable following an actual trial on the merits. See Court of Appeals opinion attached as Appendix A to Petition for Writ of Certiorari, at A-6. McDonald fails to explain how this argument creates any constitutional issue, or any conflict with the decisions of the United States Supreme Court.

McDonald does not accurately present the events below. For example, McDonald asserts that "the trial court refused to hear the Petitioners' motion for summary judgment before trial", without mentioning that (1) McDonald did not object to postponements of his motion, (2)

McDonald did not assign error to the postponements of his motion, and (3) McDonald did not raise on appeal the manner or timing of the trial court's summary judgment decision.[11]

Supreme Court Rule 21(h) requires a party making claims like McDonald's to factually demonstrate that the alleged issue was properly raised and preserved below:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court' charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction

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[11] The amicus curiae brief raised this for the first time on appeal two weeks before oral argument. See Footnote 6, supra.

> to review the judgment on writ of certiorari."

McDonald fails to provide any of this information in connection with the denial of his summary judgment motion.

McDonald's conclusory declarations that the defamation complaint was somehow technically defective are just that -- bald conclusions. No supporting law. No factual explanation. No indication that this was properly preserved on appeal (it wasn't). No compliance with Rule 21(h).

McDonald's complaint about "allowing general allegations of defamation to be made without identifying those specific statements" is seriously misleading. McDonald, over the course of his year-long hate campaign, published, almost monthly, repeated and new volleys of false and defamatory statements. Shortly before trial, the trial court required the Foundation and Mr. Gottlieb to assemble, and list

specifically, each and every statement alleged to be defamatory. The parties compiled 67 pages of specific statements. That 67 page document was the focus of much of the trial. The allegations of defamation were totally specific.

Again, McDonald fails to comply with Rule 21(h) here for a reason: he raised no similar complaint before the trial judge.

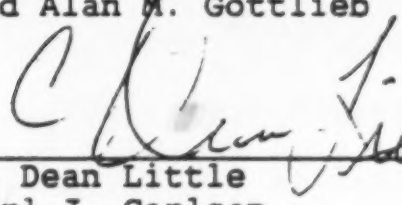
G. Conclusion.

McDonald's petition for a Writ of Certiorari turns totally on the facts, and he does not accurately present those facts. McDonald did not certify to this court any of the factual record on which he supposedly relies. However, the trial court's Findings and Conclusions, and the Court of Appeal's opinion, consistently contradict the factual predicates on which McDonald's arguments are based. If the State court's factual findings are supported by the evidence at trial, then there is no error. The

judicial system has given Greg McDonald more opportunity than he deserves to present and argue the facts. It is not for the United States Supreme Court to review, yet again, the sufficiency of the evidence. No Writ of Certiorari should issue.

DATED: November 2, 1989.

LeSOURD & PATTEN, P.S.
Attorneys for Respondents
The Second Amendment Foundation
and Alan M. Gottlieb



C. Dean Little
Carl J. Carlson

APPENDIX A

Corrections to Petitioners' Appendices D & E

At D-23 Finding 58 should read: ". . . Mr. McDonald's termination resulted <u>from</u> personality conflicts. . . "

At D-24 Finding 60 should read: ". . . with reckless disregard as to whether they were false <u>or</u> misleading. . . . "

At E-3, (Judgment & Injunction) a portion of the Judgment is omitted. Judgment ¶¶ 4 and 5 read as follows (the omitted material is underlined):

> 4. The Second Amendment Foundation is awarded judgment against Gregory R. McDonald, William L. Garrison, Samuel J. Basso, Douglas Zimmer and Jane Doe Zimmer, and the marital community composed thereof ("Zimmer", below), Sandra Baxter and T. Wyatt Baxter, and the marital community composed thereof ("Baxter", below) and Colleen McDaneld as follows:
>
> (a) <u>Against Gregory R. McDonald, in the amount of $2,500; and</u>

(b) Against Garrison, Basso, McDaneld, Baxter and Zimmer, in the amount of $1,000 each;

(c) Provided, however, that the Second Amendment Foundation shall recover on the amounts set forth above no more than the total sum of $5,000.

5. Gregory R. McDonald, William L. Garrison, Samuel J. Basso, Colleen McDaneld, Sandra Baxter and T. Wyatt Baxter, Douglas Zimmer and Jane Doe Zimmer, and all persons acting in concert or participation with them, are hereby permanently restrained and enjoined, as follows:

(a) From transacting, or attempting to transact, any business for or on behalf of The Second Amendment Foundation ("SAF").

(b) From taking possession of any additional documents, or property, of SAF.

. . . . (Etc.)